No. 87-1095-CFX
Status: GRANTED

Title: Director, Office of Workers' Compensation Programs, United States Department of Labor, Petitioner
v.
Charlie Broyles, et al.

Docketed:
December 29, 1987

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Henriques Jr.,Julian N.

Entry	Date	Note	Proceedings and Orders
1	Dec 29 1987	G	Petition for writ of certiorari filed.
3	Feb 1 1988		Order extending time to file response to petition until March 4, 1988.
4	Mar 4 1988		Brief amici curiae of National Coal Assn., et al. filed.
5	Mar 4 1988		Brief of respondents Charlie Broyles, et al. in opposition filed.
6	Mar 4 1988	G	Motion of respondents Charlie Broyles and Lisa Kay Colley for leave to proceed in forma pauperis filed.
7	Mar 16 1988		DISTRIBUTED. April 1, 1988
8	Apr 4 1988		Motion of respondents Charlie Broyles and Lisa Kay Colley for leave to proceed in forma pauperis GRANTED.
9	Apr 4 1988		Petition GRANTED. This case is consolidated with No. 87-821, Pittston Coal Group v. Sebben and No. 87-827, McLaughlin v. Sebben and a total of one hour is allotted for oral argument.
			**********
10	Apr 20 1988	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
11	May 2 1988		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
12	May 5 1988	D	Motion of respondents for divided argument filed.
14	May 19 1988		Brief of petitioner United States filed. VIDED.
15	May 19 1988		Brief of petitioners Pittston Coal Group, et al. filed. VIDED.
16	May 19 1988		Brief amici curiae of Natl. Council on Compensation Insurance, et al. filed. VIDED.
17	May 19 1988		Brief amicus curiae of National Coal Association filed. VIDED.
13	May 23 1988		Motion of respondents for divided argument DENIED.
19	May 31 1988		Order extending time to file brief of respondent on the merits until July 15, 1988.
20	Jun 21 1988		Record filed.
		*	Certified copy of original record, 6 volumes, and C.A. proceedings received.
21	Jul 15 1988		Set for argument. Monday, October 3, 1988. This case is consolidated with Nos. 87-821 and 87-827. (1st case) (1 hr.)
22	Jul 15 1988		Brief of respondents Charlie Broyles, et al. filed. VIDED.
24	Jul 15 1988	G	Motion of the Solicitor General for divided argument filed.
23	Jul 25 1988		CIRCULATED.

No. 87-1095-CFX

Entry	Date	Note	Proceedings and Orders
25	Aug 25 1988	X	Reply brief of petitioners Pittston Coal Group, et al. filed. VIDED.
26	Aug 25 1988	X	Reply brief of petitioner United States filed. VIDED.
27	Sep 15 1988		Motion of the Solicitor General for divided argument GRANTED.
28	Oct 3 1988		ARGUED.

87 1095

No.

Supreme Court, U.S.
FILED
DEC 29 1987
JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

CHARLIE BROYLES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in construing the requirement of Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. 902(f)(2), that "criteria" applied to certain claims adjudicated by the Secretary of Labor "not be more restrictive" than criteria set forth in rules applied by the Secretary of Health, Education, and Welfare (HEW) to claims filed during an earlier period, and in thereby ruling that the Department of Labor must not only apply *medical* criteria no more restrictive than those applied by HEW, but must also apply the evidentiary rules and adjudicatory standards applied by HEW.

II

PARTIES TO THE PROCEEDING

In addition to the Director, Office of Workers' Compensation Programs, the Benefits Review Board, United States Department of Labor, was a named respondent in the court of appeals. In addition to Charlie Broyles, Lisa Kay Colley was a petitioner in the court of appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

CHARLIE BROYLES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is reported at 824 F.2d 327. The decisions of the Benefits Review Board (App., *infra*, 7a-9a (*Broyles*) and App., *infra*, 18a-21a (*Colley*)) are unreported, as are the decisions of the administrative law judges (App., *infra*, 10a-17a (*Broyles*) and App., *infra*, 22a-28a (*Colley*)).

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1987. A rehearing petition was denied on September 30, 1987 (App., *infra*, 29a-30a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), provides:

> (1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—
>
> **(A)** in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;
>
> **(B)** such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;
>
> **(C)** such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and
>
> **(D)** the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish

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> criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).
>
> (2) Criteria applied by the Secretary of Labor in the case of—
>
> (A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;
>
> (B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and
>
> (C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;
>
> shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

STATEMENT

1. *Statutory and regulatory framework.* The Black Lung Benefits Act, 30 U.S.C. (& Supp. III) 901 *et seq.*, provides benefits to coal miners (and eligible survivors) who suffer from pneumoconiosis[1] that arose out of coal

[1] Pneumoconiosis is a lung disease caused by exposure to various types of dust, such as coal dust and asbestos. Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 679 & n.13 (1983). When caused by coal dust, it is known as black lung disease. The statute (30 U.S.C. 902(b)) and the regulations (20 C.F.R. 727.202) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment. For clarity, we will use "pneumoconiosis" to refer solely to the disease, treating the question of causation as distinct.

mine employment, causing total disability or death. 30 U.S.C. 901(a), 922(a), 932(c); *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, No. 86-327 (Dec. 14, 1987), slip op. 5. Claims for benefits are adjudicated under two programs, depending on the date the claim was filed. Claims filed before July 1, 1973, under "Part B" of the Act, were considered by the Department of Health, Education, and Welfare (HEW), and benefits were paid by the federal government. 30 U.S.C. 922(a), 924. Claims filed after that date, and adjudicated under "Part C" of the Act, are considered by the Department of Labor. 30 U.S.C. (& Supp. III) 925, 932. Individual coal mine operators bear primary responsibility for paying Part C benefits (30 U.S.C. 932(b)), although in certain cases Part C benefits are paid from the Black Lung Disability Trust Fund, which is financed by the coal mining industry and administered by the Director of the Office of Workers' Compensation Programs. See 30 U.S.C. 932(j), 934; 26 U.S.C. 4121(a), 9501.

a. A miner is totally disabled under the Act when he is unable to perform work comparable to that he did as a coal miner. 30 U.S.C. 902(f)(1)(A). Prior to the 1977 amendments, the Black Lung Benefits Act authorized HEW to establish the regulatory standards for determining when a coal miner's pneumoconiosis would be deemed to be totally disabling. See 30 U.S.C. (1976 ed.) 902(f). In 1972, HEW promulgated "permanent" regulations—intended to be applicable to all claims filed into the indefinite future—that set certain medical standards for determining when a miner's respiratory impairment is considered totally disabling. Under HEW's permanent regulations, to establish total disability a miner had to show through ventilatory studies (also known as pulmonary function tests) that the volume of air his lungs could expel was less than certain values (20 C.F.R. 410.426(b)), or show an impairment of the blood's ability to carry oxygen

or certain heart abnormalities (20 C.F.R. 410.424 & Subpt. D, App.).[2]

In 1972, HEW also promulgated a special interim regulation applicable only to claims filed by miners on or before June 30, 1973, or by survivors of miners who died before January 1, 1974 (Part B claims). The interim regulation was HEW's response to congressional concern about an existing backlog of claims and the unavailability of medical testing facilities to evaluate disability due to pneumoconiosis. 20 C.F.R. 410.490(a). It provided an "interim presumption" of total disability for Part B claimants who showed a respiratory impairment, measured by ventilatory studies, that is substantially less severe than is required under HEW's permanent regulations. Compare 20 C.F.R. 410.490(b)(1)(ii) with 410.426(b). This rebuttable presumption was only available to miners who had worked at least ten years in coal mines. 20 C.F.R. 410.490(b)(1)(ii) and (3).[3]

HEW's interim regulation also provided a rebuttable presumption that a claimant was totally disabled if X-ray, biopsy, or autopsy evidence established the existence of pneumoconiosis and the impairment was caused by coal

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[2] HEW's permanent regulations also incorporated the Act's requirement that a claimant would be considered totally disabled if other types of medical evidence showed that he could no longer perform the type of work he did as a coal miner (20 C.F.R. 410.412, 410.426(a), (c) and (d)), as well as a statutory irrebuttable presumption of total disability (30 U.S.C. 921(c)(3)) where X-ray evidence showed severe damage to the lung (20 C.F.R 410.418).

[3] HEW's interim regulation is unclear, in one part requiring 15 years of coal mine employment (20 C.F.R. 410.490(b)(1)(ii)), but later apparently requiring only ten years of coal mine employment (20 C.F.R. 410.490(b)(3)), to establish the interim presumption of total disability based on ventilatory studies. Courts have not resolved the ambiguity.

mine employment. 20 C.F.R. 410.490(b)(1)(i) and (2). First, if a miner worked for ten years in a coal mine his pneumoconiosis was presumed to arise from his coal mine employment. Second, in any other case the claimant "must submit the evidence necessary to establish that the pneumoconiosis arose out of employment in the Nation's coal mines." 20 C.F.R. 410.416, 410.456.[4] As a result, a miner who worked for less than ten years in a coal mine could establish a presumption of total disability under HEW's interim regulation by showing the existence of pneumoconiosis by means of an X-ray and presenting evidence supporting the claim that coal mine work caused the pneumoconiosis.

b. Congress amended the Act in 1977, shifting to the Secretary of Labor—for claims filed after December 31, 1973 (Part C claims)—the authority to issue regulations defining "total disability" and to "establish criteria for all appropriate medical tests * * * which accurately reflect total disability in coal miners * * *." Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 95; 30 U.S.C. 902(f)(1)(D). Congress also directed the Secretary to reopen claims that had been denied prior to the effective date of the 1977 amendments (30 U.S.C. 945) and provided that, in adjudicating those claims, along with others filed before the Secretary's final regulations were promulgated,[5] the "[c]riteria applied by the Secretary of Labor * * * shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973," *i.e.*,

[4] While the regulation did not specifically address how a miner with less then ten years of work in coal mines could prove that his pneumoconiosis arose from coal mine employment, a claimant may establish causation by showing that his pneumoconiosis was unlikely to have been caused by exposure to lung irritants other than coal mine dust.

[5] Final regulations, 20 C.F.R. Pt. 718, were proposed in 1978 and became effective on April 1, 1980.

to a claim adjudicated under HEW's interim Part B regulation. 30 U.S.C. 902(f)(2).

The Secretary promulgated interim regulations in 1978 to govern the cases Congress ordered reopened and those filed before the effective promulgation of the permanent regulations. They include a presumption of total disability (20 C.F.R. 727.203) that is similar but not identical to HEW's interim regulation. Labor's interim presumption regulation is more generous to claimants in certain ways. Specifically, unlike HEW's interim regulation, it provides that, in addition to X-rays and ventilatory studies satisfying medical criteria identical to those found in HEW's interim regulation, the presumption of total disability could be established by blood-gas studies, other medical evidence including a physician's opinion, and, in the case of a deceased miner and in the absence of relevant medical evidence, by the affidavit of a survivor. 20 C.F.R. 727.203(a)(3)-(5). At the same time, however, Labor's interim presumption regulation allowed the presumption of total disability based on X-ray, biopsy, or autopsy evidence of pneumoconiosis to be established only if a claimant worked in coal mines for at least ten years. 20 C.F.R. 727.203(a)(1). Thus, a claimant presenting an X-ray showing pneumoconiosis could not, as under HEW's interim regulation, gain the benefit of the presumption of total disability if he worked in coal mines for less than ten years by relying on other evidence to show causation. In that event, he could not trigger the presumption at all.[6]

[6] HEW's interim regulation states that the presumption of total disability—whether invoked through X-ray, autopsy, or biopsy evidence, or through ventilatory studies—can be rebutted by "evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work" or by other evidence, "including physical performance tests * * * establish[ing] that the individual is able to do his usual mine work or comparable and gainful work." 20 C.F.R. 410.490(c). Labor's interim presumption regulation

2. *Proceedings below.* Charlie Broyles and Bill Colley filed claims for black lung benefits before Labor's final regulation took effect in 1980. Both submitted X-rays showing the presence of pneumoconiosis. Because neither had worked in coal mines for ten years, neither could invoke the presumption of total disability under Labor's interim regulation.

With respect to Broyles, an administrative law judge determined that he had worked for five years as a coal miner from 1946 to 1952, after which he worked over 20 years at other occupations involving exposure to dust (App., *infra*, 11a-12a). Although which occupation had caused Broyles' pneumoconiosis was not clear, the administrative law judge gave Broyles "the benefit of the doubt" and concluded that coal mining had caused it (*id.* at 16a). The administrative law judge assumed that Broyles, who retired in 1976 following coronary bypass surgery (*id.* at 14a-15a), was totally disabled. However, relying on physicians' reports, the administrative law judge denied Broyles' claim because his disability was not due to pneumoconiosis, but instead was caused by his heart condition (*id.* at 16a). The Benefits Review Board affirmed (*id.* at 7a-9a).

Another administrative law judge determined that Bill Colley, who had arthritis, chronic bronchitis, and had suffered a stroke in 1978 (App., *infra*, 26a, 27a), had worked in coal mines for no more than nine and a half years between 1945 and 1962 (*id.* at 24a-25a). The administrative law judge found it "questionable" whether the X-ray Colley had submitted showed that he had pneumoconiosis (*id.* at 25a). But the administrative law judge apparently

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provided that the presumption could be rebutted in those ways (20 C.F.R. 727.203(b)(1) and (2)) or by evidence establishing that the miner's total disability did not arise from coal mine employment or that the miner did not have pneumoconiosis (20 C.F.R. 727.203(b)(3) and (4)).

assumed that Colley had pneumoconiosis and concluded, based on physicians' reports, that Colley "has not shown that his respiratory or pulmonary condition is causally related to his prior coal mine employment" (*id.* at 28a). The Benefits Review Board affirmed (*id.* at 18a-21a).

The court of appeals consolidated the two cases.[7] It reversed on the ground that in each case the administrative law judge "erred in failing to evaluate the claims under [HEW's interim regulation], 20 C.F.R. § 410.490" (App., *infra*, 2a). Relying on *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983), and *Coughlan* v. *Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985), the court concluded that Labor's interim presumption regulation is contrary to Section 402(f)(2)'s directive that the Secretary apply "criteria" that are not more restrictive than the criteria applied by HEW in its interim regulation. The court found Labor's regulations inconsistent with the statute because, under HEW's interim presumption regulation, a claimant who submitted an X-ray showing pneumoconiosis could invoke the presumption of total disability even if he had worked in coal mines for fewer than ten years, whereas, under Labor's interim regulation, the presumption could not be invoked by claimants, such as Broyles and Colley, who worked in coal mines for fewer than ten years. The court rejected the Secretary's argument that Congress intended in Section 402(f)(2) that the Department of Labor should apply *medical* criteria no more restrictive than those applied by HEW until Labor's permanent regulations were in place, but that Congress did not intend to require Labor to apply the same evidentiary standards and adjudicatory rules as applied by HEW. App., *infra*, 5a. The court remanded for reevaluation of the claims (*id.* at 6a).

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[7] Lisa Kay Colley was substituted as claimant for her father, who died prior to the court of appeals' decision.

REASONS FOR GRANTING THE PETITION

The courts of appeals are divided on the question whether the Secretary of Labor's interim presumption regulation is contrary to Congress's directive in Section 402(f)(2) that the "criteria" applied to Part C claims filed before the final regulations took effect be "not * * * more restrictive than the criteria applicable to a claim" considered under HEW's interim regulation (30 U.S.C. 902(f)(2)). This conflict has serious practical implications, since the issue may be presented in as many as 3,600 pending cases and may require the reopening of as many as 94,000 cases. Moreover, the conclusion that the regulations are inconsistent with the statute is wrong. In these circumstances, plenary review by the Court is warranted.

1. Five circuits have considered whether the Secretary of Labor's interim regulation conflicts with Congress's directive in Section 402(f)(2). The first court to do so was the Third Circuit. It concluded in *Halon* that the Secretary's interim regulation contained more restrictive "criteria" than HEW's interim regulation, contrary to Section 402(f)(2), because Labor's interim presumption could not be established by a miner presenting an X-ray showing pneumoconiosis who had worked in coal mines for fewer than ten years. Judge Weis dissented in *Halon*. He agreed with the Department that the "criteria" referred to in Section 402(f)(2) were *medical* criteria and that Congress did not intend to require the Secretary to apply the same evidentiary rules and adjudicatory standards applicable under HEW's interim regulation. Since the medical criteria in Labor's interim regulation were identical to those in HEW's interim regulation in some respects and more generous to claimants in other respects, he found the regulation consistent with the statute (713 F.2d at 30).

The Eighth Circuit followed *Halon* in *Coughlan*. Subsequently, in *Sebben* v. *Brock*, 815 F.2d 475 (1987), petitions for a writ of cert. pending, Nos. 87-821 & 87-827, that court held that the Secretary must reopen claims denied under Labor's interim regulation and reconsider them under HEW's interim regulation.

The Seventh Circuit, in *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 400 (1987), expressly rejected the holdings in *Halon* and *Coughlan*. The court found the meaning of "criteria" as used in Section 402(f)(2) ambiguous, noting that the final sentence of the preceding subsection refers to " 'criteria for all appropriate medical tests . . . which accurately reflect total disability in coal miners' " (817 F.2d at 401 (citation omitted)). Given the ambiguity, the court examined the legislative history to the provision, and concluded, as Judge Weis had concluded in dissent in *Halon*, that the Department's interpretation is consistent with the intent of Congress (817 F.2d at 402-404). Subsequently, the Sixth Circuit in *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 144 (1987), petition for a writ of cert. pending, held in a divided opinion that Labor's regulations are inconsistent with the statute, as did the court below.

The direct conflict between the Seventh Circuit's decision in *Strike* and the decisions of the other courts of appeals has serious practical implications, even though Labor's permanent regulations became effective in 1980. Claims filed before the permanent regulations took effect are to be adjudicated under the interim regulation, and nearly 9,600 of those claims are pending. The Department of Labor reviewed its summary data on black lung benefits claims and it estimates that approximately 3,600 pending claims filed before the final regulations took effect involve claimants with fewer than ten years of coal mine employ-

ment. The conflict in the circuits affects those claimants with fewer than ten years of coal mine employment who submitted X-ray, biopsy, or autopsy evidence of pneumoconiosis.

Further, the need to reopen many more decisions pursuant to the Eighth Circuit's decision in *Sebben* will be eliminated if it is decided that Labor's interim regulations are consistent with Section 402(f)(2). As noted in our petition in *Sebben* (at 10-12),[8] approximately 94,000 claims that were denied under Labor's interim regulation involved claimants who worked in coal mines for fewer than ten years, and each of those claims (most of which were finally decided more than five years ago) may have to be reopened. That massive effort is unnecessary if this Court concludes that the Eighth Circuit, along with the court below and the Third and Sixth Circuits, erred in its conclusion that Labor's interim presumption regulation is inconsistent with Section 402(f)(2).

2. The court below erred in concluding that Labor's interim presumption regulation conflicts with Section 402(f)(2). As an initial matter, the only thing plain about the language of Section 402(f)(2) is that its meaning is unclear. The Sixth Circuit in *Kyle*, which held that Labor's interim regulation is contrary to the statute, nevertheless conceded that "[m]anifestly, the term 'criteria' is subject to numerous possible interpretations" (819 F.2d at 142); see also *Strike*, 817 F.2d at 401 ("the plain meaning of the statute is ambiguous"). That is correct. "Criteria" means "a standard on which a judgment or decision may be based" (*Webster's New Collegiate Dictionary* 267 (1979)). Its meaning varies according to what is to be judged or decided, and that may in turn be illuminated from the context in which the term is used.

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[8] We are serving a copy of our petition in *Sebben* and a copy of our petition in *Kyle* on the parties to this case.

The purpose of Section 402(f) is to define the nature of the "total disability" that is necessary to qualify for benefits under the Act. See 30 U.S.C. 901(a). Section 402(f) states that a miner "shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in" coal mining or similar employment. 30 U.S.C. 902(f)(1)(A). While this ultimate standard was not in dispute when the statute was amended in 1977, there was substantial controversy at that time about the appropriate medical criteria for determining whether total disability should be found. See pages 13-16, *infra*. The controversy was resolved by providing, in Section 402(f)(1)(D), that the Secretary of Labor "shall establish criteria for all appropriate medical tests * * * which accurately reflect total disability" as defined in Section 402(f)(1)(A). Section 402(f)(2) follows immediately after Section 402(f)(1)(D), and provides that the "[c]riteria applied by the Secretary" of Labor to reopened cases and those filed prior to the effective date of permanent regulations "shall not be more restrictive than the criteria" applied by the Secretary of HEW to cases filed on or before June 30, 1973. In view of the context, the Secretary of Labor reasonably concluded that "criteria" in Section 402(f)(2) is shorthand for the phrase used in the preceding sentence, "criteria for all medical tests."

Review of the legislative history of the 1977 amendments confirms that the Secretary's reading is correct. Section 402(f)(2) originated in the House bill. That bill would have provided that the regulations governing the "total disability" determination for all Part C claims (not just claims filed before Labor's final regulations took effect) "shall not provide more restrictive criteria than those applicable" to a Part B claim decided under HEW's interim regulation. H.R. Rep. 95-151, 95th Cong., 1st Sess. 52 (1977). The House Report explained that "[t]he so-called 'permanent' *medical* standards now in effect under Part C

are much more demanding than the so-called 'interim' standards applied by HEW under Part B of the program. * * * This provision of the bill would require that standards no more restrictive than the 'interim' *medical* standards shall be equally applicable to Part C claims." *Id.* at 15 (emphasis added). The Report was apparently referring to the ventilatory study scores applied to Part C claims under HEW's permanent regulations, which were much stricter than the scores applied to Part B claims under HEW's interim regulation (compare 20 C.F.R. 410.426(b) with 410.490(b)(1)(ii)); the House intended to mandate the continued use of the ventilatory study scores applied under HEW's interim regulations. In contrast, the House Report did not suggest that it intended to mandate the continued use of any evidentiary rules or adjudicatory standards.[9]

Like the House, the Senate focused on the fact that HEW's interim ventilatory study scores "are far less stringent" than the scores in its permanent regulation. S. Rep. 95-209, 95th Cong., 1st Sess. 13 (1977). However, it ultimately determined not to require continued application of HEW's interim medical criteria. The Senate Report noted HEW's assertions "that the interim standards do not accurately determine actual disability, that they were used under Part B only to clear away the backlog of claims arising from the 1972 amendments, and that the permanent standards more accurately identify disabling respiratory

[9] Of particular relevance to the requirement of ten years coal mining experience as a prerequisite to triggering the presumption, the summary of medical knowledge on coal workers' pneumoconiosis appended to the House Report concluded that there was broad agreement that "[t]he probability that coal miners will develop black lung increases regularly after about ten years of working underground." H.R. Rep. 95-151, *supra*, at 30. In view of that recognition by Congress, it would be surprising if Congress simultaneously acted to mandate the use of a presumption of total disability for miners with fewer than ten years' experience.

and pulmonary functions in coal miners" (*ibid.*). The Report also noted that the United Mine Workers considered even HEW's interim ventilatory study scores too stringent (*ibid.*). The Senate concluded that it was "not qualified to assess the appropriateness of medical test standards to be used to determine disability in coal miners" (*ibid.*). The bill it passed gave the Secretary of Labor authority to define the term "total disability" without reference to previously applied criteria (*id.* at 34-35).

The Conference Committee adopted the Senate's version of Section 402(f) "with the proviso that the so-called 'interim' part B *medical* standards are to be applied to all reviewed and pending claims filed before the date the Secretary of Labor promulgates new *medical* standards for part C cases." H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978) (emphasis added). The version of Section 402(f) passed by the Senate became Section 402(f)(1) and the House version was modified and became Section 402(f)(2). Thus, Section 402(f)(1) directed the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, to "establish criteria for all appropriate medical tests * * * which accurately reflect total disability in coal miners" (30 U.S.C. 902(f)(1)(D)). It authorized the Department of Labor to devise new ventilatory study scores (which it has done, see 20 C.F.R. Pt. 718, App. B ("Standards for Administration and Interpretation of Pulmonary Function Tests")) and other medical standards as well, which it has also done (see 20 C.F.R. Pt. 718, App. A ("Standards for Administration and Interpretation of Chest Roentgenographs") and App. C ("Blood-Gas Tables")). Section 402(f)(2) directed the Secretary of Labor to use the "criteria" in HEW's interim regulation until the new permanent regulations took effect. Because the discussions in the committee reports of both versions of Section 402(f) focused on the difference

between the ventilatory study scores in HEW's permanent and interim regulations, and the Conference Report spoke of medical standards, it is clear that the "criteria" referred to are medical standards.

There is no evidence in the language of the statute or its legislative history indicating concern with evidentiary rules or adjudicatory standards. As the Seventh Circuit noted in *Strike* (817 F.2d at 403-404 (emphasis added)): "The only reference to the use of presumptions in the conference report stated that '[t]he conferees also intend that *all* standards are to incorporate the presumptions contained in section 411(c) of the Act [30 U.S.C. § 921(c)].' H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 * * *. That section creates a rebuttable presumption that pneumoconiosis arose out of coal mine employment '[i]f a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines.' 30 U.S.C. § 921(c)(1)." It is precisely that requirement of ten years coal mining experience that was "expressly incorporate[d]" (817 F.2d at 404) into the Secretary of Labor's interim regulation at issue in this case. Accordingly, the regulation is consistent with the statute.

Furthermore, as the court in *Strike* stated (817 F.2d at 404), "the members of the House Committee on Education and Labor, who were responsible for originally drafting the 'not more restrictive' language, reviewed and commented on the Secretary of Labor's proposed Part C interim regulations * * * [and] none were critical of the fact that the regulation required proof of at least ten years of coal mine employment" to establish the presumption of total disability. Accordingly, it seems clear that the Secretary of Labor correctly construed Section 402(f)(2) in promulgating the interim regulation at 20 C.F.R.

727.203.[10] At the least, the Secretary's interpretation of

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[10] The court of appeals' decision appears to be wrong for another reason not directly presented in this case. The court stated that "the only way to rebut this presumption is to show that the claimant is either doing or is capable of doing his usual coal mine work" (App., *infra*, 3a). Thus, the court appears to have concluded that the Secretary of Labor's interim regulation is invalid for the added reason that it authorizes two rebuttal methods not enumerated in HEW's interim regulation (see note 6, *supra*). Whether the regulation is invalid on that ground is pending in the Eighth Circuit in *Consolidation Coal Co.* v. *Smith*, No. 86-2397 (argued Oct. 16, 1987). The Sixth Circuit, while holding in *Kyle* that Labor's interim regulation is contrary to Section 402(f)(2) because it does not allow claimants with fewer than ten years of coal mine work to invoke the presumption of total disability, also suggested that Labor's interim regulation is not inconsistent with the statute insofar as it authorizes additional rebuttal methods. 819 F.2d at 144; see also *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363, 1366 n.2 (6th Cir. 1987); *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.3d 485, 490 (6th Cir. 1985).

It is less than clear that HEW's interim regulation is properly understood as barring rebuttal of the presumption by disproving pneumoconiosis or coal mining causation. Assuming that is the correct reading, however, the provisions of Labor's interim presumption regulation establishing that a claimant's total disability "did not arise in whole or in part out of coal mine employment" or that a claimant "does not, or did not, have pneumoconiosis" (20 C.F.R. 727.203(b)(3) and (4)), are plainly valid. It is clear that Congress intended to permit such rebuttal evidence, since the purpose of the Act is to provide benefits to a coal miner only "if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment" (*Mullins Coal Co.*, slip op. 5). In light of the statutory purpose, a rule that coal mine operators could not present evidence that a claimant did not have pneumoconiosis or that a claimant's disability was not caused by coal mine employment would violate the statutory requirement that "all relevant evidence" be considered. 30 U.S.C. 923(b). It would also appear to be irrational and therefore suspect on due process grounds. Cf. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 34-37 (1975) (construing Section 411(c)(4), 30 U.S.C. 921(c)(4)) not to limit the evidence a coal mine operator may present on rebuttal, thus avoiding a constitutional challenge). It is, for this additional reason, sensible to construe the reference to "criteria" in Section 402(f)(2) as encompassing medical standards, but not proof burdens or evidentiary rules.

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the ambiguous term "criteria" to refer to the medical standards in HEW's interim regulation, but not its evidentiary rules and adjudicatory standards, is a reasonable interpretation that warrants deference. See, *e.g.*, *NLRB* v. *United Food Workers Local 23*, No. 86-594 (Dec. 14, 1987), slip op. 10; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DONALD B. AYER
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

GEORGE R. SALEM
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CAROL A. DE DEO
Deputy Associate Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor

DECEMBER 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1091

CHARLIE BROYLES, PETITIONER

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, BENEFITS REVIEW BOARD, OF THE UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

No. 86-3153

LISA KAY COLLEY, PETITIONER

v.

BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR, DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS, RESPONDENTS

On Petition for Review of an Order of the Benefits Review Board

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Argued June 2, 1987

Decided July 31, 1987

Before: CHAPMAN, Circuit Judge, and BRITT and MACKENZIE, U.S. District Judges, sitting by designation.

CHAPMAN, Circuit Judge:

The appellants before us are Charlie Broyles and Lisa Colley, who has been substituted to pursue the claim originally filed by her father, the late Bill Colley. Appellants in these two consolidated cases seek review of decisions by the Benefits Review Board (BRB) affirming denials of their claims for disability benefits pursuant to the Black Lung Benefits Act, 30 U.S.C.A. § 901 *et seq.* (1986). The BRB concluded that the denial determinations, which had been issued by an Administrative Law Judge (ALJ) after hearings, were supported by substantial evidence and contained no prejudicial errors of law. Each appellant contends that the ALJ erred in failing to evaluate the claims under 20 C.F.R. § 410.490. We agree and reverse the BRB's decisions in both cases and remand them for further proceedings.

I

A miner is entitled to disability benefits under the Black Lung Benefits Act if he is totally disabled by pneumoconiosis arising out of his coal mine employment. *See* 30 U.S.C. § 901(a) and 902(b) (1986). Congress and the various agencies responsible for administering the benefits program have recognized that the existence and causes of pneumoconiosis are difficult to determine, and have over the years established a number of evidentiary presumptions to assist miners in proving their claims. Regulations creating presumptions to establish the elements of a claim for benefits have been promulgated in accordance with the legislative mandate to give the benefit of the doubt to claimants. *Southard v. Director, OWCP*, 732 F.2d 66, 71 (6th Cir. 1984). Congress has repeatedly amended the acts to ensure the liberal award of benefits and to rectify what it perceived as a persistent administrative practice of undue strictness in the award of

benefits. *Director v. Bethlehem Mines Corp.*, 669 F.2d 187, 190 (4th Cir. 1982).

The "interim presumption" at 20 C.F.R. § 410.490 was promulgated by the Secretary of Health, Education and Welfare in response to the Congressional directive that he loosen the eligibility requirements for benefits and facilitate prompt processing of claims. *Tally v. Mathews*, 550 F.2d 911, 916 (4th Cir. 1977). When promulgated, however, 20 C.F.R. § 410.490 by its terms applied only to claims filed by living miners before July 1, 1973 or by their survivors before July 1, 1974. 20 C.F.R. § 410.490(b).

The interim presumption available under 20 C.F.R. § 410.490 is clearly the least restrictive presumption which has ever been available to a black lung claimant. This interim presumption can be established through an x-ray read as showing pneumoconiosis and a showing that the disability arose out of coal mine employment. The only way to rebut this presumption is to show that the claimant is either doing or capable of doing his usual coal mine work. 20 C.F.R. § 410.490. This regulation provides a standard which is easily met. A somewhat similar interim presumption is provided under 20 C.F.R. § 727.203, however, it requires that the miner in question have ten years of coal mine employment.

In contrast, all claims filed after January 1, 1974, *see* 30 U.S.C. § 931 (1986), were initially adjudicated under more restrictive criteria. These claims were administered by the Secretary of Labor. Initially, no regulations were promulgated to govern the entitlement benefits. Instead, the Secretary of Labor adjudicated these claims under the "permanent" regulations located at 20 C.F.R. §§ 410.401-410.476.

Thus, the Secretary of Labor was adjudicating claims only under the more restrictive permanent regulations at the same time that the Secretary of Health, Education and Welfare was applying the far more lenient interim

presumption available at 20 C.F.R. § 410.490 to claims filed before the magic date of July 1, 1973. Congress, perceiving the inequity, enacted the 1978 amendments to the Act in an effort to make the proof of claims more uniform. *Director v. Bethlehem Mines Corp.*, 669 F.2d at 190.

The 1978 amendments added 30 U.S.C. § 902(f)(1)(b), which directed the Secretary of Labor to create new "permanent" criteria governing eligibility requirements. Most significantly for the purposes of this appeal, the 1978 amendments provided at 30 U.S.C. § 902(f)(2):

> Criteria to be applied by the Secretary of Labor in the case of–
>
> * * *
>
> (C) any claim filed on or before the effective date of [the new, "permanent"] regulations promulgated under this subsection [i.e., under 30 U.S.C. 902(F)(1)(D)] by the Secretary of Labor . . . *shall not be more restrictive* than the criteria applicable to a claim filed on *June 30, 1973*, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor. (Emphasis added)

Mr. Broyles initially filed his claim on September 17, 1976. Mr. Colley filed his claim on September 18, 1974. The Secretary of Labor did not effectively promulgate the new "permanent" regulations, located at 20 C.F.R. Part 718, until April 1, 1980. In each appellant's case, the ALJ found that because the claimant did not satisfy the requirement that he have been employed in the coal mines for at least 10 years, he was not entitled to the interim presumption available at 20 C.F.R. § 727.203 and his claims had to be evaluated under the more restrictive regulations found at 20 C.F.R. §§ 410.401-410.476. The

appellants argue that the interim presumption available under § 410.490 should have been applied to their claims.

In light of Congress' clear mandate in 30 U.S.C.A. § 902(f)(2) we agree with appellants' position and reverse the decision of the BRB. It is difficult to imagine that Congress picked the date of June 30, 1973, the last day under which the interim presumption would be available under 20 C.F.R. § 410.490, out of a hat. It is far more likely that Congress intended that the liberal interim presumption available under 20 C.F.R. § 410.490 be applied to all claims filed before such time while the Secretary of Labor promulgated the new "permanent" regulations at 20 C.F.R. Part 718. This holding is similar to that made in two other circuits. *See Halon v. Director, OWCP*, 713 F.2d 21 (3rd Cir. 1983); *Coughlan v. Director, OWCP*, 757 F.2d 966 (8th Cir. 1985).

The Department of Labor contends that 30 U.S.C. § 902(f)(2) should be read to indicate that the Secretary of Labor may not apply "*medical* criteria" more restrictive than those that applied to claims pending on June 30, 1973. The Department contends that 20 C.F.R. § 727.203(a), a regulation promulgated by the Secretary of Labor, creates a presumption of total disability using "*medical* criteria" identical to those available in 20 C.F.R. § 410.490 and thus satisfies the requirements of 30 U.S.C. § 902(f)(2) despite the fact that it conditions the interim presumption on proof by the miner of 10 years of coal mine employment. This argument is not persuasive. The only support the Department offers is ambiguous bits of legislative history which do not support its contention that the word "criteria" in 30 U.S.C. § 902(f)(2) should be read as "medical criteria". *See Halon* and *Coughlan*.

Both appellants alleged that the administrative decisions at issue contained other errors of law. Although we have considered these arguments, we have found no other prejudicial errors of law. It should be noted, however, that if

on remand the 20 C.F.R. § 410.490 presumption is found applicable, certain conflicts in the evidence may require reevaluation, in view of the shift in the burden of proof.

Based upon the foregoing, we reverse the decisions of the BRB on these claims, and remand the claims for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DEPARTMENT OF LABOR

BRB No. 84-232 BLA
OWCP No. 235-28-1500

CHARLIE BROYLES, CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

[Filed Feb. 27, 1986]

DECISION AND ORDER

Appeal of the Decision and Order of V. M. McElroy, Administrative Law Judge, United States Department of Labor.

Margaret F. Woulfe (Chadwell & Kayser Ltd.), Chicago, Illinois, for the claimant.

Michael J. Denney (Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Counsel for Benefit Programs), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN and DOLDER, Administrative Appeals Judges, and WHITE, Administrative Law Judge.*

* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. §921(b)(5) (West Supp. 1985).

PER CURIAM:

Claimant appeals the Decision and Order (81-BLA-8613) of Administrative Law Judge V. M. McElroy denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found that claimant established 5 years of coal mine employment, and the existence of pneumoconiosis arising out of coal mine employment, but failed to establish total disability due to pneumoconiosis.

In reviewing the administrative law judge's Decision and Order, the Board's role is limited. If the findings of fact and conclusion of law are supported by substantial evidence, are not irrational, and are consistent with applicable law, the decision must be affirmed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This claim was filed in 1976, and therefore, the administrative law judge properly considered it under 20 C.F.R. Part 410 of the regulations. *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981). Further, because this claim arises in the Fourth Circuit, the administrative law judge properly found that 20 C.F.R. §410.490 is not applicable to the instant claim. *Reilly v. Director, OWCP*, 7 BLR 1-139 (1984). Last, the administrative law judge properly concluded that the claimant's blood gas studies failed to meet the Appendix table values, and do not establish total disability pursuant to 20 C.F.R. §410.424(a).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

/s/ JAMES F. BROWN
James F. Brown
Administrative Appeals Judge

/s/ NANCY S. DOLDER
Nancy S. Dolder
Administrative Appeals Judge

/s/ ARTHUR C. WHITE
Arthur C. White
Administrative Law Judge

Dated this 27th
day of February 1986

APPENDIX C

UNITED STATES DEPARTMENT OF LABOR

Case No. 81-BLA-8613
OWCP No. 235-28-1500

CHARLIE BROYLES, CLAIMANT

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, PARTY-IN-INTEREST

MARGARET F. WOULFE, ESQUIRE
Chadwell & Kayser,
Chicago, IL
For the Claimant

KEVIN KOPLIN, ESQUIRE
Office of the Solicitor
U.S. Department of Labor
Chicago, IL
For the Director

Issued: Dec. 19, 1983

Before: V. M. McELROY, Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* In accordance with the Act and the regulations promulgated thereunder, the claim was referred for hearing to the Office of Administrative Law Judges of the U.S. Department of Labor by the Director, Office of Workers' Compensation Programs ("OWCP").

A hearing was held in Chicago, IL, at which time both parties presented evidence and argument, as provided for in the Act and the regulations issued thereunder. Director's Exhibits ("DX") 1-37 and Claimant's Exhibits ("CX") 1-3 were received into evidence at the hearing. The Claimant was hospitalized for treatment of pneumonia at the time of the hearing and was, therefore, unable to testify at the hearing. Subsequent to the hearing the Claimant's deposition was taken, at which the Director's counsel was present. The Claimant's deposition and brief have been received by this Office, and the record is now closed.

FINDINGS OF FACT

1. *The Claimant's Employment*

The Claimant's first employment was apparently as a farm laborer in 1942. Later he became a mechanic in the U.S. Army from 1942-1945. After he left the service, the Claimant worked as a coal miner from 1946 until 1952[1] approximately five years total (DX 1,2,4; CX 2). From 1952-1957 he worked as a[n] auto mechanic and much of his time was spent re-lining brakes of automobiles. From 1952-1958 the Claimant operated a filling station. In 1958-1959 he loaded trucks with 20# boxes of plastic toys. From 1959 until June of 1975 when he retired, the Claimant worked for the Crane Packing Company, first as a lapmaster operator and then as a lead man. His duties required him to pour an abrasive dust, apparently some sort of carborundum material, into these machines. This abrasive material was then used to "lap" or polish the parts

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[1] (The Claimant's social security records found in DX 3 are not considered because they are for the wrong social security number. CX 3 contains the correct earnings record of the Claimant).

placed into the lapmaster machine. The Claimant testified that he was exposed to little or no dust in his employment as a[n] automobile mechanic, lapmaster operator and lead man. The Claimant's testimony is not entitled to weight regarding the level of dust exposure in his other than coal mine employment. Both the automobile mechanic and lapmaster operator positions by their nature involved some dust exposure.

2. *The Responsible Operator*

As all of the Claimant's coal mine employment antedated 1 January 1970, the Director, OWCP will provide for the payment of any benefits which may be due to the Claimant from the Black Lung Disability Trust Fund (20 CFR 725.490; 725.492).

3. *The Claimant's Dependent*

The Claimant has one dependent for purpose[s] of augmentation of benefits under the Act, his wife, with whom he is living (T4; DX6).

4. *The Claimant's Medical History*

a. *The X-ray Readings*

The earliest X-ray of record was taken on 9 February 1977. The first reading of this film bears a date of 9 May 1977. Dr. John S. Fitzpatrick interpreted the film as evidencing simple pneumoconiosis, Type p, profusion 1/1 in all zones of the Claimant's lungs and Type v, profusion 0/1 in the upper zone of the Claimant's right lung. Inactive tuberculosis was also noted (DX 17). This film was reread by one G. Jackson on 13 June 1977 as 0/0 for pneumoconiosis. Emphysema and inactive tuberculosis were noted (DX 14). The next film was taken on 11 March 1980. Dr. Fitzpatrick, who on this reading noted that he is a Board-certified radiologist, interpreted the film as

evidencing pneumoconiosis Type p, profusion 1/1 in all zones of the Claimant's lungs and Type s, profusion 0/1 in the lower zones of both the Claimant's lungs. Emphysema was suspected and it was noted that the Claimant was under a physician's care for treatment of active tuberculosis (DX 16). A film of the same date was reread by Dr. Charles D. Smith, a Board-certified radiologist and NIOSH certified "B" reader as 0/0 for pneum[o]coniosis on 9 April 1980 (DX-15). This rereading is not considered because the wrong social security number appears on the report. The latest film was taken on 1 July 1980. Dr. Brent Brandon, a Board-certified radiologist and NIOSH certified "B" reader interpreted the film as evidencing simple pneumoconiosis, Type q, profusion 1/0 in the upper zones of both the Claimant's lungs (DX 30). Based upon the foregoing the Claimant is found to have demonstrated the existence of simple pneumoconiosis by X-ray as of 9 February 1977.

b. *The Ventilatory Studies*

The Claimant underwent ventilatory studies on 13 April 1977 and 11 March 1980 (DX 8,9). The Claimant's height is 69". In the first study the Claimant demonstrated an FEV_1 of 2.9 and MVV of 49. It was unclear whether the Claimant's low MVV was attributable to muscle weakness or poor cooperation, and the Claimant's cooperation and comprehension were not noted in the report. Hence, this study is entitled to no weight. In the second study the Claimant demonstrated a FEV_1 of 2.8 and MVV of 58. His FEV_1 was noted to be normal and his MVV moderately reduced. Cooperation and comprehension of the Claimant were stated to be good.

c. *The Arterial Blood Gas Studies*

The Claimant's first arterial blood gas study of record was undertaken on 11 March 1980. He demonstrated a

pCO_2 level of 29 and a pO_2 of 101.7 while resting [and] breathing room air (DX 12). His second study was undertaken on 1 July 1980 also while resting and breathing room air. He demonstrated a pCO_2 level of 29 and pO_2 level of 65 (*ibid.*). Dr. Richard S. Buddington felt that the Claimant demonstrasted a class III of moderate impairment (*ibid.*). The latter study was validated on 1 July 1980 by Dr. Sarah B. Long (DX 13).

d. *The Physicians' Reports*

The Claimant was seen by Dr. Stephen M. Hessl on 29 January, 9 February and 20 April 1977 (DX 10). Dr. Hessl diagnosed the Claimant as suffering from pneumoconiosis secondary to inhalation of fibrogenic dust, and atherscleroticheart disease. Based upon the Claimant's history Dr. Hessl felt that the Claimant's limiting factor was his dyspnea and that he had a moderate to severe functional impairment (class II New York Health Assn.) In an 11 March 1980 examination Dr. Hessl diagnosed the Claimant as having atherscleroticheart disease, post myocardial infraction [*sic*] and coronary bypass as well as angina pectoris. Additionally, the Claimant was thought to have chronic bronchitis and coal workers' pneumoconiosis (AMA class II respiratory and/or cardiac impairment (DX 11; see also CX 3).

Dr. Sarah B. Long revi[e]wed the Claimant's medical evidence on 7 April 1981 (DX 18). Dr. Long was of the opinion that the Claimant was disabled from his heart disease rather than black lung disease and noted the Claimant had coronary artery bypass surgery in both 1975 and 1979. Dr. Long did not feel that the Claimant's five years of coal mine employment was sufficient to account for his respiratory impairment.

e. *The Claimant's Testimony*

The Claimant testified in his deposition that he retired in 1976 at the age of 54 years. He became short of breath

because of blockage of the arteries of his heart. After he left work to undergo coronary bypass surgery he never returned (Dep. T 30). He was hospitalized with pneumonia in February of 1983 (Dep. T 32). Currently he uses oxygen for three hours per day (Dep T 24).

CONCLUSIONS OF LAW

I

The Claimant's deposition is received into evidence.

II

As the Claimant has less than ten years of coal mine employment his claim must be examined under 20 CFR Part 410 Subpart D (*Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981)). To meet the requirements of this subpart the Claimant "must affirmatively prove the existence of pneumoconiosis, that such pneumoconiosis arose out of coal mine employment and that pneumoconiosis is the primary cause of his total disability" (*Ovies v. Director*, OWCP, 3 BLR 1-609 (1981)).

The finding of the existence of pneumoconiosis may be predicated upon a qualifying X-ray or biopsy report (20 CFR 410.414(2)) [*sic*]. As the Claimant has been found to have demonstrated X-ray evidence of pneumoconiosis, i.e. simple pneumoconiosis, profusion 1/0 or greater, he has satisfied this portion of his burden of proof.

Whether the Claimant's pneumoconiosis arose out of his coal mine employment is less clear. The Claimant's dust exposure while he worked as a[n] automobile mechanic, which often involved relining brakes, and as a lapmaster operator and lead man which involved pouring abrasive dust into a lapmaster machine may well have substantially contributed to his condition. This is especially true because he only mined coal for 5 years while he spent

over twenty years in the other occupations. There is no medical opinion in which it is stated to a reasonable degree of medical certainty that the Claimant's pneum[o]coniosis is from his coal dust inhalation. Likewise, there is no opinion stating with certainty that his pneumoconiosis is not from coal mining. In light of the fact that the Claimant's dust exposure as a miner was most likely much more intense than in his other employment, he is given the benefit of the doubt.

The claim must fail, however, as there is not substantial proof indicating that the Claimant's total disability is due to coal workers' pneumoconiosis. There is no indication in the record of the impact of the Claimant's tuberculosis on his health. The Claimant has not demonstrated total disability based upon his ventilatory study because a miner 69″ in height must demonstrate FEV_1 and MVV values not exceeding 1.8 and 64, respectively (20 CFR Part 410.426(b)). Also the Claimant has not demonstrated total disability based upon his arterial blood gas studies because a miner with a pCO_2 level of 29 must demonstrate a corresponding pO_2 level not exceeding 65 (20 CFR Part 410 Subpart D Appendix). Likewise, no physician's report in the record indicates that the Claimant is totally and permanently disabled from pneumoconiosis. The Claimant is most likely disabled from his heart condition, as both his testimony and the opinions of the physicians, especially that of Dr. Long, indicate.

III

As the claim is denied herein, the Claimant's counsel is not entitled to an award of attorney's fees. Nor may the Claimant be charged directly for representation services rendered in pursuit of this claim (30 USC 922(a)).

ORDER

Accordingly, on the Findings of Facts, Conclusions of Law and the entire record, the Claimant's demand for benefits under the Act is hereby denied.

/s/ V. M. McElroy
V.M. McElroy
Administrative Law Judge

Washington, D.C.
VMM:bdw

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order may appeal to the Benefits Review Board within 30 days from the date of this decision by filing a notice of appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036.

APPENDIX D

UNITED STATES DEPARTMENT OF LABOR

BRB No. 83-2530 BLA
OWCP No. 235-44-0518

BILL COLLEY, CLAIMANT-PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

[Filed Sept. 19, 1986]

DECISION AND ORDER

Appeal of the Decision and Order – Rejection of Claim of V. M. McElroy, Administrative Law Judge, United States Department of Labor.

Locke E. Bowman III (Mayer, Brown & Platt), Chicago, Illinois, for the claimant.

Before: SMITH and DOLDER, Administrative Appeals Judges, and MURRAY, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order – Rejection of Claim (81-BLA-3004) of Administrative Law Judge V. M. McElroy issued on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§901-945.

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*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. §921(b)(5) (West 1986).

The administrative law judge found that claimant had only 9.5 years of coal mine employment and, accordingly, considered the claim under 20 C.F.R. Part 410. After noting that it was "questionable" whether claimant had pneumoconiosis and that the evidence of a totally disabling respiratory or pulmonary impairment was "equivocal," the administrative law judge found that claimant had failed to show that his respiratory or pulmonary impairment was causally related to his prior coal mine employment. *See* 20 C.F.R. §410.416(b).

Claimant appeals, contending that the administrative law judge erred by finding less than 10 years of coal mine employment. Claimant further contends that the administrative law judge should have considered the claim under 20 C.F.R. § 410.490, citing *Halon v Director, OWCP,* 713 F.2d 21, 5 BLR 2-115 (1983), *reinstating on rehearing* 713 F.2d 30, 5 BLR 2-20 (3d Cir. 1982). Claimant also argues that the administrative law judge erred by considering the claim under 20 C.F.R. Part 410 rather than under 20 C.F.R. Part 718. Finally, claimant contends that the administrative law judge erred by failing to grant benefits pursuant to 20 C.F.R. § 410.414(c).[1]

The Board's scope of review is limited. If the findings of fact are support[ed] by substantial evidence, are rational, and are consistent with applicable law, they are binding

---

[1] In light of our disposition of this case, we decline to address the following additional arguments advanced by claimant: the administrative law judge failed to find that the medical evidence established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. § 727.203(a)(1), (3), and (4); the administrative law judge failed to find no rebuttal of the interim presumption pursuant to 20 C.F.R. § 727.203(b); and the administrative law judge improperly permitted the issue of the existence of pneumoconiosis to be raised at the hearing, *see* 20 C.F.R. § 725.463.

upon this Board and may not be disturbed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

We affirm the administrative law judge's rejection of the testimony of claimant's half-brother, Mr. U. G. Rowe. Although Mr. Rowe's testimony and affidavits, if found credible, could support a finding that claimant worked 3 additional years from 1942-44 in 3 different Kentucky coal mines that did not report claimant's wages to the Social Security Administration, we cannot say that the administrative law judge erred by rejecting them due to inconsistencies. While lay testimony may provide substantial evidence for a finding of length of coal mine employment, *see Kephart v. Director, OWCP*, 8 BLR 1-185 (1985), an administrative law judge is not required to accept such testimony even if it is uncontradicted. *See Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986). The administrative law judge properly made the credibility determination regarding which of the inconsistent and contradictory statements he found most credible. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Nor did the administrative law judge err by rejecting Mr. Rowe's testimony regarding additional coal mine employment alleged to have occurred in 1948-50, as the Social Security records may be credited over Mr. Rowe's "hazy recollection." *See Tackett, supra.* Accordingly, we affirm the administrative law judge's finding of 9.5 years of coal mine employment.

We reject claimant's contention that the administrative law judge should have considered the claim under 20 C.F.R. Part 718 rather than 20 C.F.R. Part 410. Claimant has submitted no arguments that were not considered and rejected by the Board in *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981).

We also reject claimant's contention that the administrative law judge should have considered this claim under the provisions of 20 C.F.R. § 410.490, as the instant case arises in the 4th Circuit. *See Stanton v. Director, OWCP*, 8 BLR 1-438 (1986).

Finally, because substantial evidence exists in the record supporting the administrative law judge's finding that claimant failed to establish that his respiratory or pulmonary condition is causally related to his prior coal mine employment, it is hereby affirmed. *O'Keeffe, supra.*

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

/s/ ROY P. SMITH
Roy P. Smith
Administrative Appeals Judge

/s/ NANCY S. DOLDER
Nancy S. Dolder
Administrative Appeals Judge

/s/ FREEMAN C. MURRAY
Freeman C. Murray
Administrative Law Judge

Dated this 19th day
of September 1986

APPENDIX E

UNITED STATES DEPARTMENT OF LABOR

Case No. 81-BLA-3004
OWCP No. 235-44-0518

BILL COLLEY, CLAIMANT

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, PARTY-IN-INTEREST

DATE ISSUED: 30 SEP 1983

Pamela A. Hunter, Esquire for the Claimant
Daniel A. Caldwell, Esquire For the Party-in-Interest
Before: V.M. McElroy Administrative Law Judge

DECISION AND ORDER—REJECTION OF CLAIM

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of persons who were so totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing[1] was held in Gastonia, North Carolina, on December 14, 1982, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations issued thereunder, found in Title 20 of the Code of Federal Regulations. New Parts 725 and 727 were added to Title 20 on August 18, 1978, and were published in the Federal Register on that date (43 F.R. 36772 *et seq.*).

Findings of Fact and Conclusions of Law

Date of Filing

The claimant filed his claim for benefits under the Act on September 18, 1974. (D.l). The claim is timely filed (D.46).

Dependents

Subject to further verification by the Party-in-Interest Claimant appears to have three dependents for purposes of augmentation of benefits (D.46): (1) his current wife (D.1); and his children, (2) Barbara Ellen, born December 5, 1959 (D.1, 10), and (3) Lisa Kay, born October 21, 1968 (D.1, 10).

Responsible Operator

Not having alleged anyone to be the responsible operator in this case, the Director, Office of Workers' Compensation Programs, will provide for the payment of any benefits which may be due the Claimant.

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[1] The transcript of hearing will be referenced as "Tr." Director's exhibits are abbreviated "D." Regulation section numbers mentioned in this Decision and Order refer to sections of that Title. The record closed on February 14, 1983 (Tr. 37, 40).

Coal Miner

Claimant's Social Security records, covering employment from January 1945 through December 1962 (D.2), establish approximately 7.5 years of miner work ending in 1959 (D.42; Tr. 33).[2]

Dispute centers around any non-union Kentucky miner work, unreported to the Social Security Administration[3], in which Claimant may have engaged. Providing most of the evidence on this score is 26-year miner (Tr. 26) U.G. Rowe, age 60 (Tr. 10), and Claimant's half brother (Tr. 10, 29). Mr. Rowe testified that he worked with Claimant, who was then 14 or 15, in various Kentucky coal mines from 1942-1944, a period of three years (Tr. 10-12, 25). These mines included Blankenship, Chaney and Ratcliff Coal Companies. At age 14, Claimant, who was born May 29, 1929 (D.1), would have begun his mining employment sometime in 1943, seemingly a one-year discrepancy. But this difference may be attributable to difficulty in recalling events taking place some 40 years ago. However, he relates no Kentucky employment in his 1974 statement (D.6), explaining he thought only West Virginia mining experience was requested (Tr. 23-24). Yet, in 1979, he variously asserted that Claimant worked two years in a non-union Kentucky mine before age 15 (D.4), presumably at age 13

[2] This is a generous finding in light of quarterly credit given for each of the following: $8.33 earned in 1949's second quarter, $25.00 in 1954's third quarter, and $3.33 in 1956's fourth quarter. Added together, earnings for these three quarters are less than $50.00, the minimum previously utilized by the Social Security Administration for allowing one quarter's credit. The $30.00 earned in 1958's first quarter is subsumed by earnings during the same time for Truax Coal Company.

[3] As to miner work performed in West Virginia and all employment reported to the Social Security Administration, I credit Social Security records over Mr. Rowe's hazy recollection (Tr. 14-16; D.4-6, 36).

in 1941; and that Claimant performed mining duties in 1943 and 1944 for Blankenship Coal Company, a 2-year history of Kentucky coal mine employment (D.5). Mr. Rowe's construction of events displays too many inconsistencies to be deemed credible. Nevertheless, Mr. James Chaney (D.7) attested that Claimant worked in Chaney Coal Company for 2 years (May 1945-May 1947). Assuming this work was steady and that Mr. Chaney had a sufficient personal knowledge, as in the past corroborated by Mr. Rowe (Tr. 12), Claimant's qualifing miner work would not exceed a total of 9.5 years.

[4] Pneumoconiosis and Total Disability

Since Claimant did not establish at least 10 years of miner work, this claim is governed by Part 410, not Part 727, of the regulations. All relevant evidence will be considered to determine whether Claimant is totally disabled by coal workers' pneumoconiosis.

I. Evidence

An April 1975 X-ray was read and reread by a "B" reader as negative for pneumoconiosis (D.19, 21). A board-certified radiologist (D.44) then interpreted a November 1977 film as showing 1/0 pneumoconiosis (D.20). The superior credentials of the rereader and the great length of time that has elapsed since Claimant left the mines, makes questionable the 1977 finding of minimal pneumoconiosis.

[4] (D. 13-15) Presence of pnuemoconiosis was not a "new issue" raised for the first time at hearing (Tr. 6-7). Although it was not originally shown on the prehearing list of contested issues (D.46), the subject was raised in writing at the Deputy Commissioner level (D.22, 25, 28). Therefore, the issue is properly resolved by the undersigned. 20 C.F.R. § 725.463(a) (1982).

None of the three ventilatory tests (D.13-15) yielded scores indicative of an impairment under § 410.426(b) for a 70″ miner (FEV ≤ 1.8, MVV ≤ 65). A 1975 study revealed a qualifying FEV^1 (.765), but the MVV (156) was far in excess of table values even with poor cooperation (D.13). The MVV (65) in a (2.24) 1976 study was qualifying, but the FEV^1 (2.24) was not (D.14). The absence of spirometric tracings and a stat event [*sic*] of the miner's cooperation and comprehension also make the study nonconforming under § 410.430. Finally, both the FEV^1 (2.79) and the MVV (76) are non-qualifying for the most recent test administered in 1977 (D.15). On balance, scores achieved do not demonstrate that Claimant's pneumoconiosis is totally disabling.

A validated blood-gas study (D.44), the only one of record (D.16), is also unavailing. Claimant achieved before exercise PCO_2 of 33 and a PO_2 of 67. A qualifying PO_2 would have been 62 or less. After exercise, Claimant's April 1975 PCO_2 was 31, with a PO_2 of 86. To qualify as an impairmant under Part 410's Appendix, Claimant's PO_2 must have been 64 or less.

Claimant, age 54 at the time of hearing (Tr. 10), left coal mining because of a co-worker's death (D.1). Severe breathlessness sufaced about 5 years before his filing for benefits (D.1). Mr. Rowe testified to Claimant's breathing problems as of 1974 (Tr. 18). Since 1975, according to Mr. Rowe, Claimant has been unable to work and certainly could not perform his prior arduous coal mining (Tr. 16-17, 19-20). He does not know why Claimant cannot work, but referred to his use of a cane in 1976 and an October 1978 stroke (Tr. 19). Claimant has smoked about one-half pack of cigarettes per day since 1960 (Tr. 181).

Finally, and most telling, are doctors opinions. In April 1975, Dr. Kellum physically examined Claimant and diagnosed possible chronic bronchitis with no probable restrictive disease (D.16). Using the non-qualifying blood-gas

results, he concluded that his respiratory or pulmonary condition was not related to coal dust exposure. Dr. Bates, relying solely on a nonqualifying ventilatory study, found Claimant to have a moderate obstructive impairment (D.14). Based on physical examination and a nonqualifying ventilatory study, Dr. Sutoris detected moderately severe chronic obstructive pulmonary disease in 1976 (D.17). He did not express an opinion concerning its relationship, if any, to coal dust exposure. Dr. Sutoris did certify Claimant's total disability due to hypertensive cardiovascular disease and arthritis (D.3). In 1978, Dr. Banner, following a physical examination of Claimant, diagnosed hypertension, chronic bronchitis, and coal workers' pneumoconiosis (D.18). The doctor repeated Claimant's contention that exercise beyond one block cannot be tolerated. His comment to a 1977 ventilatory study was that claimant had a mild restrictive disease. And last, Dr. Burki, who reviewed most of the medical data in the case but did not physically examine Claimant, opined that Claimant's 7-plus years as a miner did not cause his ventilatory impairment.

II Conclusions

It is questionable whether Claimant has minimal pneumoconiosis by X-ray. Medical evidence of a totally disabling respiratory or pulmonary impairment is also equivocal. Blood-gas and ventilatory studies produced non-qualifying scores. Doctors' comments to ventilatory studies indicate at the least, a mild impairment that could prevent Claimant from undertaking his prior strenuous coal mine employment. All other physicians would seem to agree.

However, Claimant has not shown that any such disabling respiratory or pulmonary condition was caused by his exposure to coal mine dust. Only one examining physi-

cian of record, Dr. Banner, linked Claimant's respiratory and pulmonary conditions to coal mine employment. Curiously, Dr. Sutoris did not answer the question, although he identified disabling conditions that need not be connected with occupational exposures. Examining physican Dr. Kellum, keying in on the blood-gas study, determined that Claimant's conditions were not attributable to coal mine employment; and Dr. Burki concurred.

Given the record in this case, I find that Claimant has not met his burden of establishing every element of his claim. Claimant has not shown that his respiratory or pulmonary condition is causally related to his prior coal mine employment.

Attorney Fee

The award of an attorney fee under the Act is permitted only in cases in which the Claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered to him in pursuit of his claim.

ORDER

The claim of Bill Colley for benefits under the Act is denied.

/s/ V. M. McELROY
V.M. McElroy
Administrative Law Judge

Washington, D.C.
VMM/ch

NOTICE OF APPEAL RIGHTS. Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision by filing a notice of appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 757, Washington, D.C. 20036.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1091
No. 86-3153

CHARLIE BROYLES, ET AL, PETITIONERS,

v.

DIRECTOR, ETC., ET AL, RESPONDENTS.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

[Filed Sept. 30, 1987]

ORDER

The respondent's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Britt, Chief United States District Court Judge, sitting by designation and Judge MacKenzie, Chief United States District Court Judge, sitting by designation.

For the Court,

/s/ JOHN M. GREACEN
Clerk

☆ U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60172

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
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CLERK

No. 87-1095

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- v. -

CHARLIE BROYLES, et al.

Respondents.

RESPONDENTS' MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents, pursuant to Sup. Ct. R. 46.1, and for the reasons stated in the attached affidavit and attached declaration, move for leave to proceed in forma pauperis before this Court. Respondents did not seek leave to proceed in forma pauperis before the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Robert E. Lehrer

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*Counsel of Record

NO. 87-1095

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- vs. -

CHARLIE BROYLES, et al.

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED AS RESPONDENT IN FORMA PAUPERIS

I, CHARLIE BROYLES, being first duly sworn, depose and say that I am one of named respondents in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to petitioners' Petitions for Writs of Certiorari are true.

1. Are you presently employed? **NO**

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   June 1976 - $1300 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? **YES**

   a. If the answer is yes, describe each source of income, and state and amount received from each during the past twelve months.

   $701 per month in social security benefits; $195 per month in private pension benefits.

3. Do you own any cash or checking or savings account? **YES**

   a. If the answer is yes, state the total value of the item owned.

   I have about $4,500 in a checking account. My checking account funds are mainly used to meet medical expenses Medicare does not cover, and are intended as a reserve against future medical expenses my wife or I may incur, that Medicare would not cover.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? **YES**

   a. If the answer is yes, describe the property and state its approximate value.

   My wife and I jointly own the home we live in in Chicago. The approximate value of the home is $60,000.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   My wife is wholly dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Charlie Broyles
CHARLIE BROYLES

Subscribed and Sworn
before me this 4th
day of February
1988.

Benitye Clay
Notary Public

"OFFICIAL SEAL"
BENITYE CLAY
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires 6/19/91

"OFFICIAL SEAL"
BENITYE CLAY
NOTARY PUBLIC, STATE OF ILLINOIS

NO. 87-1095

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- v. -

CHARLIE BROYLES, et al.

Respondents.

DECLARATION IN SUPPORT OF MOTION TO PROCEED AS RESPONDENT IN FORMA PAUPERIS

I, LISA KAY COLLEY, declare that I am one of named respondents in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further declare that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to petitioners' Petitions for Writs of Certiorari are true.

1. Are you presently employed? **NO**

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   January 4, 1988 was the date of my last employment. My gross wages were $580.00 monthly.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? **NO**

   a. If the answer is yes, describe each source of income, and state and amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? **NO**

   a. If the answer is yes, state the total value of the item owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? **NO**

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

   I have no dependents.

I declare under penalty of perjury that the foregoing is true and correct.

X Lisa Kay Colley
LISA KAY COLLEY

Executed on: February 14, 1988.

No. 87-1095

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- v. -

CHARLIE BROYLES, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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No. 87-1095

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- v. -

CHARLIE BROYLES, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Because it omits material facts, petitioner's Statement does not offer an accurate account of the miners' employment histories or of the medical evidence.

A. Respondent Charlie Broyles

Charlie Broyles worked underground in the coal mines of Virginia for five years, as a "coal loader" and as a "track man." (Broyles Claim Form EM-911,p.4; Broyles' Deposition; pp.5-6)[1] Both jobs involved very heavy exposure to coal dust. (Id. pp.49-51,52-53).

From 1952-1976, Mr. Broyles worked in a succession of non-mining jobs. (Id. pp. 56-62; 72, 81.). One of these jobs, which he held for five years, involved occasional exposure to asbestos; but a vacuum machine that Mr Broyles regularly used substantially

[1] Statement citations are all to items in respondents' administrative records that were included in the joint appendices filed with the Court of Appeals for the Fourth Circuit.

limited any adverse effects of such exposure. (January 3, 1982 letter from Steven Hessl M.D., M.P.H.; Broyles Affidavit, March, 1981; Broyles Dep. pp. 13-26). Another job, which he held for a year, required Mr. Broyles to pour powder from a small can into a hole in a machine (Broyles Affidavit, March, 1981), but there was no resulting exposure to dust in the air Mr.Broyles breathed. (Id.; Broyles Dep. p.18.). No other jobs Mr. Broyles held from 1952-1976 involved any possible environmental dust exposure. (Id. pp. 13-38). Mr. Broyles has not worked since 1976.

Mr. Broyles has great difficulty in breathing, and is frequently short of breath (Report of Physical Examination by Steven Hessl, M.D., M.P.H.). He developed these symptoms while still working in the mines, and he has regularly received medical treatment for them since the early 1960s. (Broyles Affidavit, March 1981; Broyles Dep. p. 12). At the time of his administrative hearing, he was giving himself oxygen three hours a day, as directed by his physician. (Id. pp. 23-24).

The administrative record includes readings of three x-rays taken of Mr. Broyles' lungs. (Roentgenographic Reports of x-rays taken July 1, 1980, March 11, 1980, February 9, 1977). Readings of all three x-rays were positive for pneumoconiosis. (Id.)

The administrative record also contains reports from three doctors, but only one of these physicians ever examined Mr. Broyles. The examining physician was Steven Hessl, M.D., M.P.H., a specialist in occupational health medicine. He prepared two separate reports, based on his several examinations of Mr. Broyles. (Reports of May, 1977 and March, 1980). In both reports, he concluded that Mr.Broyles was suffering from atherosclerotic cardiovascular disease and pneumoconiosis arising out of his coal mine employment (Id.). In a supplement to the second report, he noted further that he had taken into account

Mr. Broyles' possible exposure to asbestos, but viewed any exposure as of "considerably less importance" in causing his pneumoconiosis than his work in the coal mines.(January 3, 1982 letter from Dr. Hessl). Dr. Hessl also concluded (in the first report) that Mr. Broyles' respiratory impairment was "moderate to severe" and that he was "able to walk only a few dozen feet on level ground without symptoms" and "is unable to climb,lift." The second report confirmed this finding.

B. Bill Colley, Father of Respondent Lisa Kay Colley

Bill Colley worked underground in the coal mines of Kentucky and West Virginia for at least nine and one-half years, though there is record evidence (not credited by the Administrative Law Judge) that he in fact worked for several years longer than that. (Colley ALJ Dec.) However long he actually worked in the mines, the jobs he performed involved heavy exposure to coal dust. (ALJ Hearing Testimony, p. 17).

The administrative record includes two x-rays read for pneumoconiosis. (Reports of x-rays taken April 1, 1975 and November 8, 1977). The more recent x-ray was read as positive for pneumoconiosis by John J. Fitzpatrick, M.D., a board certified radiologist. (Id.)

The record includes reports from three physicians who examined Mr. Colley: Steven Hessl, M.D., M.P.H.; Edward Sutoris, M.D. and William Kellum, M.D.

Dr. Hessl concluded that Mr. Colley suffered from hypertension, chronic bronchitis, and coal workers' pneumoconiosis. (Report of November 1, 1978). He found further that Mr. Colley's bronchitis and pneumoconiosis were related to his exposure to dust in the coal mines where he worked, and that his exercise capacity was "about one block on level ground." (Id.)

Dr. Sutoris concluded that Mr. Colley suffered from "chronic

obstructive pulmonary disease", a respiratory impairment, that was "moderately severe." (Report of May 13, 1976). He did not offer an opinion as to the cause of this respiratory impairment. (Id.)

Dr. Kellum concluded that Mr. Colley suffered from possible chronic bronchitis, but probably no restrictive disease. (Kellum Report of April 1, 1975). He found that Mr. Colley was unable to climb stairs or ladders, or walk up-grade and that he was breathless upon walking on a level grade. (Id.) While concluding that Mr. Colley's respiratory condition was not related to his coal mine employment, he did not offer any alternative explanation for what might have caused his condition. (Id.)

ARGUMENT

This Court recently granted the petitions for certiorari in No. 87-821, Pittston Coal Group v. Sebben, and in No. 87-827, McLaughlin, Sec. of Labor v. Sebben, 56 U.S.L.W. 3568 (U.S. February 22, 1988). It also consolidated the two cases. Id.

The consolidated case ("Sebben") presents for review five questions between the two petitions. Four of these questions involve principally the nature and scope of remedies available to black lung claimants for asserted violations of their statutory rights, and have no analogues in this case. See Petition in No. 87-821 (Questions Presented Nos. 1, 3,and 4), Petition in No. 87-827 (Question Presented). The question the Director, Office of Workers' Compensation (the "Director") presents for review here, and the remaining question in Sebben (Question No. 2 in No. 87-821), ask whether the Director acted consistently with Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), in refusing to apply the interim presumption in 20 C.F.R. §410.490 to certain black lung benefit claimants with less than 10 years demonstrated employment in the mines (the "substantive

Section 402(f)(2) question").[2] The court of appeals here, of course, ruled that the Director's refusal to apply the presumption did violate Section 402(f)(2).

When, as here, the question presented for review has already been accepted for review in another case, we acknowledge that there is virtually no possibility this Court will nonetheless deny the pending petition for a writ. In this situation, this Court ordinarily holds the petition and disposes of the case as appropriate in light of the disposition of the case in which review has been granted. See, e.g., Keney v. New York, 388 U.S. 440 (1967).

The ordinary course may not, however, be the most appropriate course here. As explained in note 2 supra, the court of appeals in Sebben, in contrast to the court of appeals here, never even addressed the substantive Section 402(f)(2) question. Indeed, neither the black lung benefit claimants in Sebben, nor the federal officials they sued, ever joined issue with respect to the substantive Section 402(f)(2) question in that case. Instead, they merely litigated the appropriate scope of relief to be afforded these individuals, given that the Eighth Circuit, in Coughlin v. Director, Office of Workers' Compensation, 757 F.2d 966 (8th Cir. 1985), had previously decided the substantive Section 402(f)(2) question favorably to black lung benefit

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[2] The two variant formulations of this question in No. 87-821 and here are explained, in part, by the fact that the court of appeals in Sebben never addressed it. See, Sebben v. Brock, 815 F.2d 475 (8th Cir. 1987). In this case, in contrast, the court of appeals did address this question, the parties having joined issue on it not only before that court, but before the Benefits Review Board as well. Broyles v. Director, Office of Workers' Compensation, 824 F. 2d 327 (4th Cir. 1987). In this context, the Secretary of Labor (the "Secretary"), by the Director, understandably framed the substantive Section 402(f)(2) question here in terms of the court of appeals' decision in this case. See Petition at (I). In contrast, the several coal companies and insurance company who alone presented this question in Sebben (in their petition in No. 87-821) framed it in the abstract, without reference to any specific court of appeals' ruling.

substantive Section 402(f)(2) question for review in her petition in Sebben. Rather, the substantive Section 402(f)(2) question was first presented in Sebben only by the coal company/insurance company petitioners in No. 87-821 ("Pittston"), who had introduced it into the Sebben litigation in their petition to rehear the panel decision--a petition the court of appeals subsequently denied without the coal miner claimants' in Sebben being required to respond.[3] While formally presenting this question for review in Sebben, moreover, even these petitioners hardly pressed it as a basis for issuance of the writ: the petition in No.87-821 is devoid of any argument respecting that substantive issue, as distinguished from the remedial questions. In sum, the substantive Section 402(f)(2) question comes before this Court in Sebben, never having previously been an issue in that case, and without any factual record illustrating the application of Section 402(f)(2) to the claims of particular miners.

Even though there is no jurisdictional bar to its doing so, this Court does not ordinarily consider questions not specifically considered and passed upon by the lower court. Youakim v. Miller, 425 U.S. 231, 234 (1976);, Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970); Delta Airlines v. August, 450 U.S. 346, 362 (1981) (question presented in petition, but not to court of appeals, will not be considered). It is therefore possible that, upon further consideration, this Court will conclude that Sebben is not an appropriate (or at least not the most appropriate available) vehicle for resolution of the substantive Section 402(f)(2) question, especially given the

[3] Pittston's rehearing petition was accompanied by its motion to intervene. The court of appeals granted that motion. Petitioners in No. 87-821 thus became parties in Sebben only after the court of appeals' ruling now to be reviewed, and are parties to the proceeding in this Court, never having previously participated in that litigation in any significant way.

absence of any factual record respecting that issue in that case. See, Wainwright v.City of New Orleans, 392 U.S. 598, 599 (1967) (concurring opinions of Justices Harlan and Fortas) (dismissal of writ as improvidently granted where factual record is "too opaque" and "too sketchy" to permit resolution of federal issue).[4]

If this Court does conclude that Sebben is not an appropriate vehicle for resolving the substantive Section 402(f)(2) question, then it will not decide that question in that case. Alternatively, there is a risk that the Court will decide Sebben based on the one or more of the several remedial questions presented, without reaching the substantive Section 402(f)(2) question. In either eventuality, the substantive Section 402(f)(2) question, which this Court has already decided merits its consideration, would remain unresolved --and this Court would then presumably grant certiorari in this case during the October 1988 term, and subsequently hear it. Respondents here, however, would be harmed by the resulting delay in resolving the substantive Section 402(f)(2) question, the only issue in their cases. The court of appeals' decision in their favor remanded their claims to the administrative process for further review, and therefore neither respondent can secure the benefits claimed until this Court acts. Mr. Broyles has, indeed, already waited since 1976 for the disability benefits he seeks, and Mr. Colley died during the 14 years that his claim (which his daughter now presses) has been pending.

By granting certiorari on the substantive Section 402(f((2) question presented in Sebben, this court has already decided,

[4] The Solicitor General, of course, reached precisely that conclusion, in urging that the substantive Section 402 (f) (2) question be resolved in this case, and not in Sebben. See Petition in No.87-827 at pp. 16-18. Indeed, as noted supra, the Secretary did not even present the substantive Section 402(f)(2) question for review in her petition in Sebben.

question presented in Sebben, this court has already decided, that that question merits its consideration. Given that decision, however, the risk that this substantive question will nonetheless not be decided in Sebben (because the Court concludes that it is not an appropriate vehicle for resolving it, or because of the possibility that it may not reach it), and the desirability of resolving it in a case where the court of appeals addressed it and there is an adequate factual record, are both factors why it would be appropriate to grant the writ of certiorari here without further delay. If certiorari is granted in this case this term, then the Court should schedule oral argument here in tandem with the oral argument in Sebben.

CONCLUSION

The Court should either hold the petition pending disposition of the substantive Section 402(f)(2) question in Sebben, or, if the Court concludes that this question may not be decided in Sebben, or wishes to resolve it in a case where the court of appeals addressed it and there is an adequate factual record, the Court should grant the petition and schedule oral argument in the case in tandem with the argument in Sebben.

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No. 87-1095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

CHARLIE BROYLES, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF THE NATIONAL COAL ASSOCIATION, THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, THE PITTSTON COAL GROUP, THE BARNES & TUCKER COMPANY, THE ISLAND CREEK COAL COMPANY, THE CONSOLIDATION COAL COMPANY, THE OLD REPUBLIC INSURANCE COMPANY, AND THE PENNSYLVANIA NATIONAL INSURANCE GROUP

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No. 87-1095

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Amici curiae,[1] respectfully sumit that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit filed in this proceeding on July 31, 1987 should be held in abeyance pending the disposition of *Pittston Coal Group* v. *Sebben,* Nos. 87-821 and 87-827.

INTEREST OF AMICI CURIAE

The National Coal Association (hereinafter "NCA") is a trade association comprising approximately 200 members.

1. In accordance with Rule 36.1, the written consent of the Solicitor General and Charlie Broyles, *et al.* are submitted herewith.

NCA members are directly or indirectly responsible for about 90 percent of the nation's coal production. In addition to coal producing companies, NCA's membership includes coal brokers, equipment suppliers, coal transporters, consultants, electric utilities, and resource developers.

The American Insurance Association (hereinafter "AIA") is an independent, not-for-profit insurance industry trade association whose membership includes approximately 200 property-casualty insurance companies and their subsidiaries. AIA provides a variety of services to its members and, from time to time, represents their collective interests in the course of litigation of special significance.

The National Council on Compensation Insurance (hereinafter "NCCI") is the largest not-for-profit workers' compensation insurance service organization in the United States. Its membership includes over seven hundred insurance companies and competitive state insurance funds that provide workers' compensation insurance coverage to employers throughout the United States. In thirty-five states, including most major coal mining states, NCCI proposes and administers premium rates and rating plans for workers' compensation insurance. NCCI also manages the National Workers' Compensation Reinsurance Pool (hereinafter the "Pool"). The Pool reinsures several categories of risk that arise under the federal Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1986) (hereinafter the "Act"). The Pool is the only commercial insuring vehicle available to small and high risk mine operators that are unable to qualify to self-insure their federal black lung liabilities under U.S. Department of Labor regulations, 20 C.F.R. Part 726 (1987), or to purchase direct coverage from an insurance carrier. NCCI's members and many AIA members participate in the Pool and are individually liable to the Pool for losses or payouts on claims that exceed the ability of the Pool to make payments from insurance premiums collected. Historically, from 15-20% of all federal claim liabilities are insured or reinsured by the Pool.

The Pittston Coal Group, the Barnes & Tucker Company, the Island Creek Coal Company, the Consolidation Coal Company, the Old Republic Insurance Company, and the Pennsylvania National Insurance Group[2] are the petitioners in *Pittston Coal Group* v. *Sebben*, *cert. granted*, 56 U.S.L.W. 3555 (U.S. Feb. 22, 1987) (No. 87-821). The question presented in the Government's petition for certiorari here is among those presented by the petitioners in *Pittston Coal Group*. Pittston and its co-petitioners are individual mine operators and commercial insurance carriers, each of which has substantial liability for claims arising under the Act.

Mine operators and their insurers directly or indirectly bear the burden for the payment of all benefits awarded under the Department of Labor administered portions of the Act, 30 U.S.C. §§ 932, 933, 934, the cost of administration of the black lung program, 30 U.S.C. § 934(a)(5), and the payment of interest on the debt accrued by the Black Lung Disability Trust Fund, 30 U.S.C. § 934(a)(4).[3]

Black lung claims filed with the Secretary of Labor prior to April 1, 1980 were and continue to be subject to adjudication under an eligibility rule called the "interim presumption." The Secretary of Labor's interim presumption is published at 20 C.F.R. § 727.203 (1987). Black lung claims adjudicated by the Social Security Administration (hereinafter "SSA") were considered under another version of the interim presumption published at 20 C.F.R. § 410.490 (1987). The two presumptions differ in certain respects, and some (but not all) claimants will be

2. The Pittston Coal Group is a wholly-owned subsidiary of the Pittston Companies; the Island Creek Coal Company is a wholly-owned subsidiary of the Occidental Petroleum Corporation; the Consolidation Coal Company is a wholly-owned subsidiary of the E.I. duPont de Nemours & Company; and the Old Republic Insurance Company is a wholly-owned subsidiary of the Old Republic International Corporation. The Barnes & Tucker Company and the Pennsylvania National Insurance Group are independent entities.

3. The insurance industry parties are responsible for the payment of incurred losses on individual claims only. The mine owners are responsible for the payment of individual claims not covered by insurance and for funding the Black Lung Disability Trust Fund, 26 U.S.C. §§ 4121, 9501.

more likely to obtain an award of benefits under the SSA rule. Several circuits, including the Fourth Circuit in this case, have held that the SSA rule must apply in Labor Department claims if such application produces a more favorable result for the claimant. *See Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987).

Section 410.490 differs from section 727.203 in two significant respects: (1) Section 410.490 may be invoked by a miner, with fewer than ten years of coal mine exposure, where chest x-rays are positive for black lung disease, while section 727.203 requires ten years of mine work for its invocation; and (2) For a miner who has died or is permanently disabled from any cause, occupational or not, section 410.490 may be irrebuttable. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d at 329. It also appears to be irrebuttable even if the miner does not have black lung disease. *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1184 (7th Cir. 1987). Section 727.203 is rebuttable by proof that the miner does not have black lung disease or was not disabled by a health impairment related to coal dust exposure. 20 C.F.R. § 727.203(b).

Amici believe that the decision of the Fourth Circuit, if applied to still pending claims[4] subject to adjudication under the interim presumption, effectively deprives amici of fundamental defensive rights to contest non-meritorious claims. Further, the decision of the Fourth Circuit will, without doubt, require the payment of benefits directly or indirectly by amici to several thousand claimants not properly within the contemplation of the Act, at a cost averaging from $118,315.88 to $185,659.69 per claim. U.S. Department of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* 32 (1981). This liability is both unfunded and unanticipated. The imposition of this liability on

4. In *Mullins Coal Co. Inc. of Virginia* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 430 (1987), this Court observed that there are about 10,000 still pending claims to be decided under the interim presumption. While the volume has probably decreased to some extent since briefing in *Mullins*, the number of claims in this category remains significant.

the affected industries will disrupt federal benefit funding mechanisms well into the twenty-first century, and is not and never will be affordable for many smaller mine owners and insurers.

Liability for the payment of benefits to miners who do not have black lung disease or are not disabled by it, should not be properly imposed on amici in the guise of a black lung disability compensation benefit. Congress did not intend this result and the Secretary of Labor's regulations are properly designed to preclude it. The Fourth Circuit's decision to the contrary departs from reason and is a matter of immediate and substantial concern to amici.

ARGUMENT

On February 22, 1988, this Court granted the petitions for certiorari in and consolidated *Pittston Coal Group* v. *Sebben* and *McLaughlin* v. *Sebben*, 56 U.S.L.W. 3555 (U.S. Feb. 22, 1987) (Nos. 87-821 and 87-827). Among the questions presented in *Pittston Coal Group* is whether the Secretary of Labor's interim presumption, to the extent that it differs from section 410.490, is consistent with the Act. A resolution of this question in *Pittston Coal Group* disposes of the instant case.[5] On the assumption that

5. *Pittston Coal Group* addresses the retroactive application of section 410.490 to previously denied and closed cases. The instant case addresses application of section 410.490 in pending claims. This distinction should have no direct relevance to a resolution of the question. It is noted that there are important issues presented in *Pittston Coal Group* that are, at least hypothetically, dispositive of *Pittston* but not this case; however, from amici's perspective, *Pittston* is the preferred vehicle because only it affords the Court a setting within which the underlying problem may be resolved in all of its dimensions and only it affords all affected industries the opportunity to fully participate as parties and frame the issues in this matter of such substantial importance. Until this Court accepted *Pittston Coal Group* for plenary review, mine operators and their insurers had been deprived of the right to be heard in a timely way on the section 410.490 question.

Two additional petitions for certiorari raising the section 410.490 question have been filed in *Director, Office of Workers' Compensation Programs* v. *Kyle*, 56 U.S.L.W. 3463 (U.S. Dec. 21, 1987) (No. 87-1045) and *National Council on Compensation Insurance* v. *Kyle*, 56 U.S.L.W. 3484 (U.S. Dec. 21, 1987) (No. 87-1065). The petitions for certiorari in *Kyle* present potential problems that this Court need not address as their resolution will not advance the orderly disposition of the key issues presented. Otherwise, *Kyle* replicates the instant case in most respects, and it too should be resolved by *Pittston Coal Group*.

Pittston Coal Group should resolve the section 410.490 issue, amici suggest that the convenience of the Court and the several parties involved is best served by holding this petition for certiorari in abeyance pending resolution of *Pittston Coal Group*. In the alternative, amici urge the Court to grant certiorari in this case.

The merits of the petition in this case, are fully detailed by the Solicitor General and by Pittston and its co-petitioners in *Pittston Coal Group*. Their reiteration here serves no purpose.

CONCLUSION

Amici ask the Court to hold the petition for certiorari in abeyance pending the disposition of *Pittston Coal Group*.

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Nos. 87-821, 87-827 and 87-1095

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IN THE

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OCTOBER TERM 1987

PITTSTON COAL GROUP, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

ANN MCLAUGHLIN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Petitioners,

v.

CHARLIE BROYLES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FOURTH CIRCUITS

BRIEF FOR THE PETITIONERS PITTSTON COAL GROUP, BARNES AND TUCKER COMPANY, ISLAND CREEK COAL COMPANY, CONSOLIDATION COAL COMPANY, OLD REPUBLIC INSURANCE COMPANY AND PENNSYLVANIA NATIONAL INSURANCE GROUP

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QUESTIONS PRESENTED

1. Does the United States Department of Labor's black lung eligibility presumption published at 20 C.F.R. § 727.203 (1987) violate section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), because it contains certain evidentiary rules that are less favorable to black lung claimants than the Social Security Administration's black lung eligibility presumption published at 20 C.F.R. § 410.490 (1987).

2. If 30 U.S.C. § 902(f)(2) requires application of the Social Security Administration presumption in claims involving the individual liability of coal mine operators, does 30 U.S.C. § 902(f)(2) violate the due process of law guarantees of the Fifth Amendment to the United States Constitution.

3. If 30 U.S.C. § 902(f)(2) requires the Secretary of Labor to adopt the Social Security Administration rule and passes constitutional muster, does 28 U.S.C. § 1361 confer jurisdiction on the United States courts to require the Secretary of Labor to reopen and readjudicate tens of thousands of previously denied claims otherwise barred by the Longshore Act and res judicata.

LIST OF PARTIES AND RULE 28.1 STATEMENT

Numbers 87-821 and 87-827 arise out of a suit for class certification and mandamus filed in the United States District Court for the Southern District of Iowa. James Sebben, John Cossolotto, Bruno Lenzini and Charles Tonelli were the plaintiffs and purported class representatives in the district court and appellants in the Eighth Circuit. Each plaintiff was an applicant for benefits under the Black Lung Benefits Act. Ann McLaughlin is the Secretary of Labor; Steve Breeskin is an employee of the United States Department of Labor having certain administrative responsibilities in connection with the black lung program. Secretary McLaughlin and Mr. Breeskin were defendants in the district court and appellees in the court of appeals.

In the Eighth Circuit, the Pittston Coal Group, Barnes and Tucker Company, Island Creek Coal Company, Consolidation Coal Company, Old Republic Insurance Company and the Pennsylvania National Insurance Group sought and were granted leave to intervene as indispensable parties on the side of the federal parties.

Intervenors are the petitioners in No. 87-821 and the Department of Labor officials are the petitioners in No. 87-827.

In No. 87-1095, Charlie Broyles and Lisa Kay Colley are separate claimants for benefits under the Black Lung Benefits Act. Both were petitioners in the Fourth Circuit seeking relief from denials of benefits in prior administrative proceedings. The Director, Office of Workers' Compensation Programs, United States Department of Labor, defended both claims on behalf of the Black Lung Disability Trust Fund and was the respondent in the Fourth Circuit. The Director is the petitioner in this Court.

The Barnes and Tucker Company and the Pennsylvania National Insurance Group are independent corporate entities without relationships that must be listed under Rule 28.1 of the Rules of the United States Supreme Court. The Pittston Coal Group is a wholly owned subsidiary of the Pittston Companies. The Island Creek Coal Company is a wholly owned subsidiary of the Occidental Petroleum Corporation. The Consolidation Coal

Company is a wholly owned subsidiary of the E.I. du Pont de Nemours & Company. The Old Republic Insurance Company is a wholly owned subsidiary of the Old Republic International Corporation.

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Nos. 87-821, 87-827 and 87-1095

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

PITTSTON COAL GROUP, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

ANN MCLAUGHLIN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Petitioners

v.

JAMES SEBBEN, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Petitioners,

v.

CHARLIE BROYLES, *et al.*,

Respondents.

BRIEF FOR THE PETITIONERS PITTSTON COAL GROUP AND CO-PETITIONERS

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 815 F.2d 475 (Pet. App. 1a).[1] The Eighth Circuit's orders denying rehearing are unreported (Pet. App. 17a-18a). The orders of the Eighth Circuit granting intervention are unreported (Pet. App. 19a-20a). The district court's order granting the Government's motion to dismiss for lack of subject matter jurisdiction is unreported (Pet. App. 21a).

1. The Solicitor General's motion to dispense with the printing of the joint appendix in Nos. 87-821 and 87-827 was granted on March 21, 1988. Citations to the Petitioners' Appendix ("Pet. App.") in this Brief refer to the Appendix to the Petition for Writ of Certiorari filed by the Pittston Coal Group and its co-petitioners in No. 87-821.

The opinion of the Fourth Circuit is reported at 824 F.2d 327 (Broyles App. 1a).[2] The Fourth Circuit's order denying rehearing is unreported (Broyles App. 29a). The decisions of the Benefits Review Board, United States Department of Labor, and of the administrative law judge are unreported (Broyles App. 7a-28a).

JURISDICTION

In Nos. 87-821 and 87-827, the decision of the Eighth Circuit was filed on March 25, 1987. Timely petitions for rehearing filed by the Government and on behalf of intervenors were denied on June 25, 1987 (Pet. App. 17a) and July 24, 1987 (Pet. App. 18a), respectively. On September 17, 1987, Justice Blackmun signed orders extending the time for both the Government and intervenors to file a petition for a writ of certiorari to and including November 20, 1987 (Pet. App. 24a).

In No. 87-1095, the decision of the Fourth Circuit was filed on July 31, 1987 (Broyles App. 1a). A timely petition for rehearing was denied on September 30, 1987 (Broyles App. 29a). Jurisdiction was conferred on the Fourth Circuit by the filing of a timely petition for review of a decision of the Benefits Review Board, United States Department of Labor, in accordance with 33 U.S.C. § 921(c), *incorporated into* 30 U.S.C. § 932(a).

The jurisdiction of this Court is invoked in these cases under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following authorities are printed in the Petitioners' Appendix:

1. U.S. Const. amend. V (Pet. App. 25a)
2. 5 U.S.C. § 553 (Pet. App. 25a)
3. 30 U.S.C. § 902(f) (Pet. App. 27a)

2. The Solicitor General's motion to dispense with the printing of the joint appendix in No. 87-1095 was granted on May 2, 1988. Citations to the Broyles Appendix ("Broyles App.") in this Brief refer to the Appendix to the Petition for Writ of Certiorari filed by the Solicitor General in No. 87-1095.

4. 30 U.S.C. § 932(a) (Pet. App. 28a)
5. 33 U.S.C. § 919 (Pet. App. 29a)
6. 33 U.S.C. § 921 (Pet. App. 31a)
7. 20 C.F.R. § 410.490 (1987), The Social Security Administration "Interim Presumption" (Pet. App. 34a)
8. 20 C.F.R. § 727.203 (1987), The Department of Labor "Interim Presumption" (Pet. App. 37a)

STATEMENT OF THE CASE

A. Introduction

More than 424,000[3] claims filed under the Black Lung Benefits Act,[4] 30 U.S.C. §§ 901-945 (1982) ("the Act"), have been adjudicated by the U.S. Secretary of Labor under a comprehensive benefit eligibility regulation called the "interim presumption," 20 C.F.R. § 727.203 (1987). Approximately 155,000[5] of these claims were denied after adjudication and are now closed, while some 9,600[6] remain pending.

There are two versions of the "interim presumption": one promulgated by the Social Security Administration ("SSA") in 1972 at 20 C.F.R. § 410.490 (1987), and one adopted by the Secretary of Labor in 1978 at 20 C.F.R. § 727.203. The two

3. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 7, 102, 186 (1981) (prepared statements of Morton E. Henig, U.S. General Accounting Office; Sam Church, Jr., President, United Mine Workers of America; Charles Coakley, Counsel, American Insurance Association) *("1981 Oversight Hearings")*.

4. Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, 95 Stat. 1643, the Black Lung Benefits Revenue Act of 1981, 95 Stat. 1635, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a),(d), 100 Stat. 312, 313, and Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503.

5. *1981 Oversight Hearings, supra* note 3.

6. Solicitor General's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in No. 87-1095 at 11.

versions are similar, but not identical. Black lung claims within SSA's jurisdiction were considered only under section 410.490, and claims within the Labor Department's jurisdiction were considered only under section 727.203.

The United States Court of Appeals for the Eighth Circuit directed the Secretary of Labor to reopen all previously denied and closed Labor Department claims and readjudicate them under the SSA interim presumption. *Sebben* v. *Brock*, 815 F.2d 475 (8th Cir. 1987). The United States Court of Appeals for the Fourth Circuit held that still pending claims also are to be considered under the SSA interim presumption. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987). This Court has consolidated the two cases. 108 S. Ct. 1288 (1988).

The potential combined impact of these decisions is staggering. The cost of readjudication alone is sure to be hundreds of millions of dollars. The cost to the U.S. coal industry and its insurers in added benefits payable will reach into billions of dollars, virtually all of which liability is unfunded and unanticipated.[7]

The Pittston Coal Group and its co-petitioners seek reversal of the holdings below in both *Sebben* and *Broyles*, and the restoration of order in the federal black lung program.

B. Background of the Black Lung Benefits Program

The Black Lung Benefits Act establishes a federal program to compensate coal miners and their families for total disability or death due to coal workers' pneumoconiosis ("black lung" disease). 30 U.S.C. § 901(a). The program is divided into two segments called "Part B," 30 U.S.C. §§ 921-925, and "Part C," 30 U.S.C. §§ 931-945. The Part B program began on December 30, 1969, and terminated for new claims on June 30, 1973.

7. *See* Brief Amici Curiae of the American Insurance Association and the National Council on Compensation Insurance in Support of the Petition for Writ of Certiorari in *Sebben* at 8-9.

Part B claims were filed with SSA and adjudicated under regulations published by the Secretary of Health, Education and Welfare ("HEW"). Benefits awarded under Part B were and continue to be paid by the U.S. Treasury from general revenues. *See Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 429 (1987). Part B claims are adjudicated in accordance with procedures specified in section 205 of the Social Security Act. 42 U.S.C. § 405, *incorporated into* 30 U.S.C. § 923(b).

Claims filed on or after July 1, 1973, *i.e.*, Part C claims, are filed under the workers' compensation law of the state in which the miner was employed, if that law has been approved by the Secretary of Labor. 30 U.S.C. § 931. In the absence of an approved state law,[8] the claimant may file a claim with the U.S. Department of Labor under regulations published by the Secretary of Labor. *Id.* §§ 902(f), 932, 936. Part C claims, if allowed, are paid by the mine operator that last employed the miner or by its insurance carrier, 20 C.F.R. Part 725, subpart F (1987), or by an accounting entity called the Black Lung Disability Trust Fund, 30 U.S.C. §§ 933, 934, 934a.[9] The Trust Fund is financed by a manufacturers excise tax on coal. 26 U.S.C. § 4121. If unable to meet current obligations from coal tax revenues, the Trust Fund borrows from the Treasury and is obligated to repay these amounts with interest.[10] 30 U.S.C. § 934(a)(4), (5).

8. No state's law has ever been approved under 30 U.S.C. § 931.

9. The Trust Fund is responsible for the payment of claims predicated upon coal mine employment terminated prior to January 1, 1970, 30 U.S.C. § 932(c), or where no responsible mine owner can be identified, or if the identified mine owner refuses to pay the claim, 30 U.S.C. § 934(a). The Trust Fund also pays all administrative expenses of the black lung program, 30 U.S.C. § 934(a)(5), and the attorney fees of counsel representing claimants paid by the Trust Fund. *See, e.g., Republic Steel Corp.* v. *United States Dep't of Labor*, 590 F.2d 77 (3d Cir. 1978).

10. As of September 1987, the Trust Fund owed almost $3 billion to the Treasury. U.S. Dep't of Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 30, 1987). Four additional supplemental requests for borrowing authority have been made thus far in fiscal year 1988.

Part C also incorporates by reference the claims procedures and several other provisions affecting the rights and duties of employers contained in the Longshore Act. 33 U.S.C. §§ 901-952 (Supp. IV 1987), *incorporated in parts into* 30 U.S.C. § 932(a). The Longshore Act is a federal workers' compensation law for persons engaged in maritime employment. Longshore Act procedures contemplate an Administrative Procedure Act ("APA") trial, 5 U.S.C. § 554, *incorporated into* 33 U.S.C. § 919(d), an administrative appeal to the Department of Labor's Benefits Review Board and a further appeal as of right to a United States court of appeals, 33 U.S.C. § 921.

Part B and Part C are fundamentally different in both statutory design and intent. Part B was intended to be a unique remedial measure to compensate miners unable to obtain workers' compensation benefits under state laws. It was not intended to be a workers' compensation law. *See* H.R. Rep. No. 460, 92d Cong., 2d Sess., pt. 1, at 5-7 (1971); *Hearing on H.R. 18, H.R. 42, H.R. 43 and H.R. 5702 Before the General Subcomm. on Labor of the House Comm. on Education and Labor* 56-58 (1971). Part C was intended to either facilitate the integration of the federal program into existing state workers' compensation laws or to function like, and in lieu of, a state workers' compensation program.[11] *See* H.R. Rep. No. 460, *supra*, at 26-28; S. Rep. No. 209, 95th Cong., 1st Sess. 13-14 (1977) (stating it was "intended that traditional workers' compensation principles . . . be included within [Part C] regulations"); *see also Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 397 (7th Cir. 1987).

C. Background of the Interim Presumptions

The original Act delegated exclusive authority to write medical eligibility rules for both Part B and Part C claims to the Secretary

11. Section 224 of the Social Security Act, 42 U.S.C. § 424a(2)(A), requires the reduction of social security disability insurance benefits by workers' compensation benefits paid to the SSDI beneficiary. For purposes of section 224, Part C benefits are deemed workers' compensation benefits but Part B benefits are not. 30 U.S.C. § 922(b).

of HEW.[12] During the second year of the Part B program Congress became dissatisfied with SSA's claims approval rate, and for that and other reasons amended the Act in several significant respects[13] in the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) (codified in scattered sections of 30 U.S.C.).

The Senate Committee on Labor and Public Welfare, responding to SSA testimony concerning the unexpectedly large volume of claims filed and the paucity of certain medical testing facilities in coal mining areas, included in its Report special instructions for SSA.

> The backlog of claims which have been filed under [Part B of the Act] . . . cannot await the establishment of new facilities or the development of new medical procedures. They must be handled under present circumstances in the light of limited medical resources and techniques.
>
> Accordingly, the Committee expects the Secretary [of HEW] to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these Amendments. Such interim rules and criteria shall give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claim [sic] on the basis of medical evidence other than breathing tests when it is not feasible or practicable to provide physical performance tests of the type described [by HEW].

12. *See* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 402(f), 411, 83 Stat. 793 (1969). The Secretary of Labor believed he had no authority to write medical eligibility standards and so informed Congress. H.R. Rep. No. 151, 95th Cong., 1st Sess. 15-19 (1977), *reprinted in* House Comm. on Education and Labor, 96th Cong., 1st & 2d Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* 508, 522-26 (Comm. Print 1979) ("*1977 Legislative History*").

13. Among other things, the 1972 amendments delayed the start of the Part C program for eighteen months, Pub. L. No. 92-303, § 5, 86 Stat. 155, prohibited the denial of a claim solely on the basis of a single negative chest x-ray, added a new eligibility presumption for certain long-term coal miners and liberalized the statutory definition of the term "total disability." *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 27-36 (1976).

S. Rep. No. 743, 92d Cong., 2d Sess. 18-19, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305, 2322-23.

After enactment, SSA published a regulation entitled *Interim Adjudicatory Rules for Certain Part B Claims filed by a Miner Before July 1, 1973, or by a Survivor of a Miner Where the Miner Died Before January 1, 1974.* 20 C.F.R. § 410.490. Section 410.490 could not be applied in Part C claims, which were to be considered under an alternative set of SSA regulations, 20 C.F.R. §§ 410.401-.476.[14]

The Labor Department's black lung program began in late 1973, and within a few years it became clear that Labor's approval rate was well below that of SSA. Responding to congressional inquiry, the Labor Department identified the inapplicability of the interim presumption as a significant reason for its lower approval rate and asked SSA to revise its rules to make the presumption–applicable in Part C claims. *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 49 (1977) *("1977 Senate Hearings"); Hearings on H.R. 3476, H.R. 8834, H.R. 8835, and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 329, 341, 349, 399 (1973-1974). HEW's general counsel refused this request, suggesting that the presumption was designed to increase the speed and frequency of SSA awards without regard to the validity of the claim and thus could not be constitutionally applied in Part C's adversary setting or to the private liabilities of mine owners.[15]

The debate then moved to Congress. There was essentially no scientific testimony that section 410.490 established a medically valid formula for determining total disability or death due to black lung disease. To the contrary, two SSA staff physicians

14. The Department of Labor adopted the SSA provisions, excluding section 410.490. 20 C.F.R. § 718.2, 38 Fed. Reg. 16,965 (1978) (repealed 1978).

15. *See* H.R. Rep. No. 151, *supra* note 12; P. Barth, *The Tragedy of Black Lung: Federal Compensation for Occupational Disease* 85-91 (1987).

testified that the medical criteria reflected in the rule were scientifically invalid, and that SSA lawyers wrote section 410.490 to eliminate the agency's backlog, erring on the side of an award.[16] Labor Department witnesses echoed SSA's views and sought authority to write scientifically supportable eligibility rules.[17] The Comptroller General of the United States reported that SSA's rule produced large numbers of unsubstantiated awards.[18] This report concluded that any effort to make the SSA interim presumption applicable to Part C claims should also direct the Labor Department to substantiate entitlement by medical evidence.

The House passed a bill requiring application of criteria "not more restrictive than" SSA criteria in Part C claims. H.R. 4544, 95th Cong., 1st Sess. § 7(a) (1977). The Senate bill authorized the Secretary of Labor to write new Part C eligibility criteria. S. 1538, 95th Cong., 1st Sess. § 2 (1977). The compromise bill conformed to the Senate version, but also provided:

> Criteria applied by the Secretary of Labor in the case of . . .[certain categories of claims filed prior to publication of Labor's new regulations] shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

16. *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA) *("1977 House Hearings"); 1977 Senate Hearings, supra* p. 8, at 193-95 (testimony of Dr. Herbert Blumenfeld, Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA).

17. *1977 Senate Hearings, supra* p. 8, at 154; *1977 House Hearings, supra* note 16, at 241 (testimony of Donald Elisburg, Assistant Secretary of Labor).

18. Comptroller General of the United States, *Report to the Senate Comm. on Human Resources: Program to Pay Black Lung Benefits to Coal Miners and Their Survivors—Improvements Are Needed* 43-47, 52 (1977), *reprinted in 1977 Senate Hearings, supra* p. 8, at 316-20, 325.

30 U.S.C. § 902(f)(2).[19] The conferees cautioned the Labor Secretary that SSA's history of making unsubstantiated awards was not to be repeated and instructed the Secretary to write a regulation no more restrictive than those applicable to a claim filed on June 30, 1973, "*except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register.*" H.R. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 309 (emphasis added).

D. The Two Presumptions Contrasted

The Secretary of Labor published an interim presumption for Part C claims on August 18, 1978. 43 Fed. Reg. 36,825 (1978). Labor's rule is unavailable unless the miner worked "at least 10 years" in coal mine employment. 20 C.F.R. § 727.203(a).[20] After proving that fact, the presumption is invoked if chest x-ray, autopsy or biopsy evidence establishes the existence of pneumoconiosis, or pulmonary function (ventilatory) tests show values meeting published standards, or arterial blood gas study results meet published standards, or medical opinion evidence establishes a totally disabling lung disease, or in the absence of medical evidence, lay testimony demonstrates a totally disabling lung disease. *Id.* § 727.203(a)(1)-(5).

Section 410.490 can be invoked only if chest x-ray, autopsy or biopsy evidence establishes pneumoconiosis, or if pulmonary function tests meet published values identical to those in section

19. In the 1977 amendments, Congress directed the Secretary of Labor to automatically reopen and reconsider all previously denied Part C claims under the more favorable eligibility rules adopted in 1978. Congress also afforded previously denied Part B claimants the opportunity to seek further review, on their own election, by either SSA or the Department of Labor, or by both agencies. 30 U.S.C. § 945(a), (b).

20. In neither Part B nor Part C does the unavailability of an interim presumption end the consideration of a claim. A claimant who cannot use the interim rule may still establish eligibility either under the statutory presumptions, 30 U.S.C. § 921(c)(1)-(5), or by direct proof of disability or death due to black lung disease, 20 C.F.R. §§ 410.490(e), 727.203(d).

727.203(a)(2). 20 C.F.R. § 410.490(b)(1)(i), (ii).[21] SSA invocation on pulmonary function scores requires either ten or fifteen years of coal mine employment.[22] *Id.* § 410.490(b)(1)(ii), (b)(3). Under section 410.490(b)(2), a miner with positive x-ray evidence may not invoke the SSA presumption unless "the impairment established in accordance with subparagraph (1) of this paragraph arose out of coal mine employment." The provision then ends with the parenthetical "(see §§ 410.416 and 410.456)." The parenthetical cross references two alternative means of establishing occupational causation of the disease—either by proof of ten years of mine employment, or by proof "necessary to establish that the pneumoconiosis arose out of employment in the Nation's coal mines (see §§ 410.110(h), (i), (j), (k), (l), and (m))." *Id.* §§ 410.416, 410.456. Although the route is circuitous, one may conclude from the language[23] that a claimant who had not worked in mining for ten years could invoke the SSA presumption on positive x-ray proof combined with proof of occupational causation.[24]

21. SSA paid benefits on the basis of arterial blood gas studies meeting published values and proof of pneumoconiosis. 20 C.F.R. Part 410 subpart D Appendix. Labor's blood gas tables are less restrictive than those used by SSA.

22. The provisions are internally inconsistent.

23. Petitioners believe, but cannot clearly demonstrate in published case law, that SSA did not permit use of section 410.490 absent ten years of coal mine employment. Sources imply that this was the case but are inconclusive. *See Maxey* v. *Califano*, 598 F.2d 874, 876 & n.3 (4th Cir. 1979); *see also* Comptroller General of the United States, *Report to the Congress: Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability* 4, 12 (1980). It is clear that persons involved with the program believed that ten or more years were required. *Hearings on H.R. 3476, H.R. 8834, H.R. 8835, and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 353, 367, 395, 398 (prepared statement of Bedford W. Bird, Deputy Director, Department of Occupational Health, United Mine Workers' of America; testimony of John Rosenberg, Director, Appalachian Research and Defense Fund).

24. A positive chest x-ray alone is not diagnostic of black lung disease and may exhibit a lung tissue reaction due to coal dust, other dusts, smoking or other causes. Pendergrass, et al., *Roentgenological Patterns in Lung Changes that Simulate Those Found in Coal Workers' Pneumoconiosis*, 200 Annals N.Y. Acad. of Sci. 494 (1972); Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 730 (1981).

Thus, the medical bases for invocation in section 727.203 are as favorable or more favorable to claimants than are the SSA provisions. But, at least theoretically, SSA's rules permit some short-term coal miners to use the presumption while Labor imposes a ten-year threshold in all cases.

Rebuttal differences between the two presumptions are dramatic. The SSA rule may be rebutted if the miner is still working, or if "other evidence" shows that the miner is able to work. 20 C.F.R. § 410.490(c)(1), (2). The SSA rebuttal inquiry has nothing to do with whether black lung disease is present, or if present, whether it has any role in the miner's inability to work. Although the intricate cross references employed in the SSA rules could be construed otherwise, the circuit courts have noted "the HHS presumption cannot be rebutted by medical evidence." *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1185 (7th Cir. 1987). The Fourth Circuit holds, "the only way to rebut this [SSA] presumption is to show that the claimant is doing or capable of doing his coal mine work." *Broyles*, 824 F.2d at 329.

Of the one and one quarter million black lung claims filed, approximately 600,000 were processed by SSA under section 410.490. Yet, we are unable to find a single reported case in which section 410.490 was rebutted by medical proof that the miner did not have black lung disease or was not medically disabled by the disease.[25] This is astounding, but not inconsistent with Congress's perception and the Comptroller General's findings that rebuttal by SSA was not generally contemplated, and rebuttal evidence was not considered. *See supra* pp. 8-9 and note 18.

By contrast, the rebuttal language of Labor's rule requires the consideration of all relevant evidence, and provides for rebuttal if proof establishes that the miner is not totally disabled by, did not

25. The few instances in which rebuttal of the SSA rule was permitted are cases involving a miner still employed in his regular coal mine job. *See Farmer* v. *Weinberger*, 519 F.2d 627 (6th Cir. 1975). It appears that SSA attempted, on occasion, to rebut section 410.490 solely on the basis of blood gas test results but the courts rejected these attempts. *See Oliver* v. *Califano*, 476 F. Supp. 12 (D. Utah 1979); *Mutter* v. *Weinberger*, 391 F. Supp. 951 (W.D. Va. 1975).

die due to, or did not have pneumoconiosis. 20 C.F.R. § 727.203(b)(1)-(4). Although there is little uniformity among the circuits (and even within each circuit) on rebuttal rules, rebuttal of Labor's rule by disproving a presumed fact is difficult but possible.[26] Rebuttal of SSA's rule by disproving presumed medical facts is not possible.

E. Background of the Litigation

In 1982, a Third Circuit panel held that section 727.203 was more restrictive than section 410.490, and thus violated 30 U.S.C. § 902(f)(2), because the Labor rule does not afford a short-term miner the opportunity to benefit from the interim presumption. *Halon* v. *Director, Office of Workers' Compensation Programs*, 713 F.2d 30, 31 (3d Cir. 1982). On rehearing, the Government argued that its rule does not violate 30 U.S.C. § 902(f)(2) because Congress did not direct Labor to adopt all of SSA's rule. Rather, the statute and, more importantly, its history focus only on the "medical criteria" of SSA's rule.

It is the Secretary of Labor's position that the agency was required to make the basic interim presumption available by x-ray, autopsy, or biopsy proof of pneumoconiosis, or ventilatory test values matching those used in section 410.490(b). The agency was not also required to adopt the additional evidentiary devices of section 410.490. In support of this argument, the Government points to substantial proof that Congress intended a

26. *See Wright* v. *Island Creek Coal Co.*, 824 F.2d 505 (6th Cir. 1987) (disability due to heart disease not compensable); *Kolesar* v. *Y & O Coal Co.*, 760 F.2d 728 (6th Cir. 1985) (miner too old to work, but not disabled); *Knudtson* v. *Benefits Review Board*, 782 F.2d 97, 100 (7th Cir. 1986) (presumption of pneumoconiosis rebutted by proof of no occupational disease); *Peabody Coal Co.* v. *Lowis*, 708 F.2d 266 (7th Cir. 1983) (disability due entirely to cigarette use not compensable). *But see Roberts* v. *Benefits Review Board*, 822 F.2d 636 (6th Cir. 1987) (benefits awarded for disability due to stroke). The *published* decisions of the Fourth Circuit make rebuttal all but impossible. *See Adkins* v. *United States Department of Labor*, 824 F.2d 287 (4th Cir. 1987); *Sykes* v. *Director, Office of Workers' Compensation Programs*, 812 F.2d 890 (4th Cir. 1987). Labor's rebuttal provisions are still frequently litigated in the circuit courts.

distinction between "medical criteria" and "evidentiary standards." A majority of the Third Circuit panel, over a strong dissent, was unconvinced and ordered the Secretary to readjudicate Halon's claim under section 410.490. *Halon*, 713 F.2d at 21, 25.

The Eighth Circuit followed suit and directed the Secretary to apply section 410.490 in two cases arising within that court's jurisdiction. *Coughlan* v. *Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985). The Eighth Circuit added little to the discussion, noting only that it would not defer to the Secretary's regulation. *Id.* at 968.

The issue was addressed by the Seventh Circuit in *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987). This panel disagreed with the Third and Eighth Circuits.

> From their inception in 1969, however, the Part B and Part C programs were intended to be separate and distinct. This difference was only accentuated in 1977 when Congress delegated the regulatory authority with respect to Part C claims to the Secretary of Labor while leaving the regulatory authority with respect to Part B claims with the Secretary of HEW. Until permanent Part C regulations could be promulgated, Congress mandated in § 902(f)(2) that the Part B interim medical standards be applied by the Secretary of Labor. . . . But the Secretary was not otherwise bound by the Part B rules and was free to adopt his own adjudicative criteria for processing such claims.

817 F.2d at 405-406. In reaching this conclusion, the Seventh Circuit defers to the Secretary's rule, finding no clear indication that the Secretary's interpretation of section 902(f)(2) departs from Congress's intent.[27]

27. The Seventh Circuit reiterated its holding in *Taylor* v. *Peabody Coal Co.*, 838 F.2d 227 (7th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3739 (U.S. April 15, 1988) (No. 87-1720). *Taylor* involves a miner with *more than* ten years of employment seeking the more favorable rebuttal format of section 410.490.

The Sixth Circuit then adopted the reasoning of the Third, noting that the term "criteria" in 30 U.S.C. § 902(f)(2) was generic and justified no distinction between "medical" and "nonmedical" provisions, as urged by the Labor Secretary. *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 143 (6th Cir. 1987), *petitions for cert. filed*, 56 U.S.L.W. 3643, 3484 (U.S. Dec. 21, 1987) (Nos. 87-1045, 87-1065). Judge Guy dissented, having been persuaded by Judge Weis' dissent in *Halon*. 819 F.2d at 144.[28]

The Fourth Circuit's turn came in *Broyles*. Finding the reasoning of *Halon* more persuasive than that of the Secretary, the *Broyles* panel holds that section 410.490 applies to all Labor Department claims. This panel also holds that "the only way to rebut this presumption is to show that the miner is either doing or capable of doing his usual coal mine work." *Broyles*, 824 F.2d at 329. The Third Circuit joined the Fourth in holding that the section 410.490 rebuttal provisions apply in Labor Department claims. *Sulyma* v. *Director, Office of Workers' Compensation Programs*, 827 F.2d 922 (3d Cir. 1987).

These decisions have enormously disrupted the ongoing litigation of almost ten thousand pending claims. While several hundred of these are in the circuit courts, the remainder are before the Benefits Review Board or administrative law judges

28. The Sixth Circuit's view differs from *Halon* and *Coughlan* in one important respect. The Sixth Circuit refuses to apply the rebuttal provisions of section 410.490 in claims adjudicated under section 727.203. *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363 (6th Cir. 1987). Before *Kyle*, the Sixth Circuit addressed the application of section 410.490 *rebuttal* rules to section 727.203 claims, holding that 30 U.S.C. § 902(f)(2) did not "require continuation of the evidentiary rules applicable to Part B cases." *Ramey* v. *Kentland Elkhorn Coal Co.*, 755 F.2d 485, 490 (6th Cir. 1985). To distinguish *Ramey*, the *Kyle* panel held, "*Ramey* should not be read to suggest that the Part B presumptions no longer apply. On the contrary, *Ramey* should be interpreted to hold that although the Part B presumptions are preserved, under certain limited circumstances, the specific evidence necessary to rebut those presumptions may be altered over time." 819 F.2d at 144.

("ALJs").[29] *Halon* and its progeny, if upheld, will require retrial of thousands of claims.

F. Background of These Cases and Opinions Below

Sebben began in the U.S. District Court for the Southern District of Iowa as a suit for nationwide class certification and a writ of mandamus to compel the Secretary of Labor to reopen and readjudicate, under section 410.490, all previously denied and closed Part C cases. The district court granted the Secretary's motion to dismiss, holding that plaintiffs failed to exhaust administrative remedies and that the procedures specified for the adjudication of Part C black lung claims did not contemplate review in the U.S. district courts (Pet. App. 22a-23a). Further, the court found no basis on which to exercise jurisdiction under 28 U.S.C. § 1361 as the Eighth Circuit in *Coughlan* imposed no duty on the Secretary of Labor to apply section 410.490 retroactively.

On March 25, 1987, the *Sebben* court, relying on *Coughlan*, reversed the district court. Observing that the persons in the class "deserve to have their claims heard," the Eighth Circuit held that the statutory time limits prescribed for the exhaustion of administrative remedies specified in the Longshore Act are not jurisdictional and erect no barrier to the exercise of mandamus

29. The Benefits Review Board held that in all cases arising in the Third, Fourth, and Sixth Circuits (by far the majority of cases), section 410.490 must be applied in its entirety for purposes of both invocation and rebuttal. *Peyton* v. *Brown Badgett, Inc. Coal Co.*, 10 Black Lung Reporter (MB) 1-122 (Benefits Review Board 1987) (Sixth Circuit); *Shortt* v. *Westmoreland Coal Co.*, 10 Black Lung Reporter (MB) 1-127 (Benefits Review Board 1987) (Fourth Circuit); *Grieco* v. *Director, Office of Workers' Compensation Programs*, 10 Black Lung Reporter (MB) 1-139 (Benefits Review Board 1987) (Third Circuit). The Board applies SSA's rule whether or not the claim involves fewer than ten years of mine employment. *Cornelius* v. *D. W. Miller, Inc.*, 11 Black Lung Reporter (MB) 1-29 (Benefits Review Board 1988). There is, in fact, no logic to restrict section 410.490 to the claims of short-term miners. On May 2, 1988, however, the Benefits Review Board issued a decision holding section 410.490 invalid as applied in Part C claims on the ground that the rule had never been published for notice and comment as required by 5 U.S.C. § 553. *Whiteman* v. *Boyle Land and Fuel Coal Co.*, 11 Black Lung Reporter (MB)___, BRB No. 87-348 BLA (Benefits Review Board 1988). How ALJs will resolve the apparent conflict between the Board and the circuits is not yet known.

jurisdiction by the district court (Pet. App. 15a). The Eighth Circuit directed the district court to certify the class and grant a writ ordering the Secretary to readjudicate each claim within it, citing *Bowen* v. *City of New York*, 106 S. Ct. 2022 (1986). The class was to comprise all previously denied and closed claims filed between December 30, 1969 and April 1, 1980, involving a claimant who had submitted at least one positive chest x-ray, but did not work in coal mining for at least ten years (Pet. App. 16a). The Solicitor General and intervenors then filed petitions for a writ of certiorari.

Broyles involves the claims of two former coal miners, Charlie Broyles and Bill Colley. Broyles worked as a coal miner for about five years from 1946-1952 (Broyles App. 11a). Colley worked in mining for approximately nine and one-half years from 1945-1959 (Broyles App. 24a). Broyles' x-ray evidence was deemed positive by the ALJ (Broyles App. 13a). Proof of pneumoconiosis was deemed "questionable" by the ALJ in Colley's case (Broyles App. 27a).

In *Broyles*, the ALJ reviewed all of the medical evidence and, after resolving all doubt in favor of the claimant, concluded that the record was devoid of substantial proof that Broyles is totally disabled due to pneumoconiosis. No presumptions were applied in this analysis and the claim was denied (Broyles App. 16a-17a). The Benefits Review Board affirmed per curiam (Broyles App. 8a), and Broyles appealed to the Fourth Circuit.

In *Colley*, the ALJ reviewed the medical record and found most persuasive the opinions of two physicians that Colley's health problems were not due to coal mine employment. No presumptions were applied, and the claim was denied (Broyles App. 28a). The Benefits Review Board affirmed, finding the ALJ's decision supported by substantial evidence. The Board also rejected Colley's section 410.490 argument (Broyles App. 20a-21a). Colley then appealed to the Fourth Circuit, which consolidated the two cases. The Fourth Circuit followed *Halon* and reversed the Benefits Review Board in both cases. The Solicitor General filed a petition for a writ of certiorari.

SUMMARY OF ARGUMENT

These cases present several questions of significance. Primary among them is whether the Black Lung Benefits Act precludes the Secretary of Labor's discretion to design an interim presumption that requires ten years of coal mine employment for its invocation and affords employers a fair opportunity for rebuttal. The language of the Act and its history reasonably support the premise that the Labor Secretary was not compelled to merely republish the SSA rule. Indeed, Labor was directed not to do so, and could not do so in keeping with the agency's duty to preserve the rights of claim defendants to a fair hearing.

In designing its rule, Labor undertook to accommodate all competing interests and through this effort produced an entitlement standard of unprecedented liberality in civil litigation. As the rule evolved, Labor took all reasonable steps to ensure its compliance with congressional purposes, going so far as to ask the most outspoken members of Congress for written approval. Having obtained that approval, Labor published its rule, and the rule passed muster in the regulatory process. It has been applied in hundreds of thousands of claims and has delivered billions of dollars in benefits to miners and their families. The Secretary of Labor's actions accord with Congress's intent and purposes and are well within the limits of discretion. They are entitled to judicial deference. Section 727.203 is valid for these reasons.

The preference of the courts below for the SSA rule narrowly focuses on the single word—"criteria"—in the midst of thousands and fails to acknowledge the many factors that must be accorded weight in the validity equation. Moreover, were the courts below correct in deciphering Congress's purposes, the result that follows denies due process of law to mine owners. The Due Process Clause of the Fifth Amendment does not allow the imposition of private liabilities on the strength of a rule of evidence that defies reason.

The Eighth Circuit has compounded the error by mandating the retrial of tens of thousands of closed claims under the SSA rule. The Eighth Circuit has no jurisdiction to accomplish this

result. Black lung claims are litigated under incorporated provisions of the Longshore Act. The Longshore Act expressly precludes access to the district courts and it embodies the premise that final decisions in claims are in fact final. Its time limitations for pursuit of the remedies provided are mandatory and jurisdictional. They may not be waived. The *Sebben* plaintiffs have sought to bypass the Longshore Act but the Act expressly prohibits them from doing so.

Apart from the Longshore Act, res judicata is properly applied in this setting. The claimants had their day in court, and there is no valid reason to permit them to start over.

The Eighth Circuit's reliance on the mandamus statute is similarly misguided. Mandamus jurisdiction is ousted by the Longshore Act. Were that not the case, mandamus remains an improper judicial response to the issues presented. The Labor rule evolved in a complex accommodation of competing considerations. It is a complex rule and has been beset by controversy. Its promulgation was by no theory a ministerial act. This is not a case where mandamus authority, or any other theory of law, authorizes a court to dictate the result.

The decisions of both the Fourth Circuit and the Eighth Circuit are manifestly in error in all respects and should be reversed.

ARGUMENT

I.

THE SECRETARY OF LABOR'S REGULATION IS VALID AND IS THE ONLY INTERIM PRESUMPTION THAT MAY BE APPLIED IN PART C CLAIMS

A. The Act Does Not Compel the Labor Department to Use All of the SSA Rule

The fundamental question presented in *Sebben* and *Broyles* is whether section 727.203 is a valid regulation. Labor's rule is not ambiguous. It requires ten years of coal mine employment for its invocation, and it provides for the rebuttal of presumed facts. The SSA rule is, at least theoretically, available to miners with

positive chest x-rays who did not work in mining for at least ten years. Certain facts presumed by the SSA rule (*i.e.*, the presence of pneumoconiosis or a totally disabling condition connected at least in part to this occupational disease) are irrebuttable. The validity of section 727.203 turns on whether the Act authorizes these differences.[30] The starting point in the inquiry is the language of the Act. *CBS* v. *FCC*, 453 U.S. 367, 377 (1981).

Benefits are payable under the Act only if (1) the miner has pneumoconiosis, (2) the disease arose out of coal mine dust exposure (disease causation), (3) the miner has a totally disabling condition or is deceased, and (4) the totally disabling condition or death is attributable at least in part to pneumoconiosis (disability causation). 30 U.S.C. § 901(a); *see also Mullins Coal Co.*, 108 S. Ct. at 431.

Part A of the Act, 30 U.S.C. § 901-902, contains general provisions defining the Act's terms and allocating authority to the administering agencies to write benefit eligibility rules. Section 402(b) defines the term "pneumoconiosis" to mean "a chronic dust disease of the lung and its sequelae, including respiratory or pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). No special regulatory authority is allocated to Labor or SSA to define disease causation. The Act, however,

30. The Labor rule exhibits no technical defects. Section 426(a) of the Act, 30 U.S.C. § 936(a), requires the Secretary of Labor to issue regulations in conformity with 5 U.S.C. § 553. That was done here. 43 Fed. Reg. 17,770-71 (1978). More importantly, 30 U.S.C. § 936(a) and 30 U.S.C. § 902(f)(1) clearly provide that *only* the Secretary of Labor may issue regulations governing Part C claims. To simply apply SSA's rule to Department of Labor claims violates the Act. Question 3 in the Petition for a Writ of Certiorari filed by the Pittston Coal Group and its co-petitioners inquires whether the court below may simply promulgate a rule for the Department. It is axiomatic that the court has no authority to write an agency rule. *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 545 (1978). Thus, were this Court to agree with the Fourth and Eighth Circuits that section 727.203 is impermissibly restrictive, the matter must be remanded to the Secretary of Labor for rulemaking under 5 U.S.C. § 553. Because the answer to Question 3 is not dispositive, and because it goes to the remedy and not the merits, the question is not further discussed in this Brief.

permits a presumption of occupational cause if a miner has ten or more years of employment. 30 U.S.C. § 921(c)(1), (2).

The term "total disability" is defined in 30 U.S.C. § 902(f). This provision allocates regulatory authority to the Secretary of Labor to define "total disability" for Part C claims and to the Secretary of HEW to define "total disability" for Part B claims "subject to the relevant provisions of subsections (b) and (d) of section 413 [30 U.S.C. § 923(b), (d)]," 30 U.S.C. § 902(f)(1), and several other limitations listed in 30 U.S.C. § 902(f)(1)(A)-(D), (f)(2). Section 902(f)(1)(D) directs the Secretary of Labor, in collaboration with the National Institute for Occupational Safety and Health, to "establish criteria for all appropriate medical tests . . . which accurately reflect total disability in coal miners. . . ." Section 902(f)(2) directs that in all claims reopened by Congress in 30 U.S.C. § 945, and in all new claims filed before the Secretary of Labor developed new rules, "criteria applied by the Secretary of Labor shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973. . . ."

The language in section 902(f)(2), in context, submits to no easily settled meaning. Had Congress wanted Labor to apply the SSA rule without modification or elaboration, or had Congress intended to revoke the Secretary of Labor's regulatory authority to write a rule of his own design, it would have been a very simple matter to have said so. Instead, Congress enacted a fairly complex structure, leaving it to the agencies to effectuate congressional purposes in published rules.

While implications may arise from the statutory context and choice of words,[31] this is surely not a case where the words themselves speak so clearly that there is no room for agency interpretation. It is a case where resort to the legislative history is required.

31. The word "criteria" is used three times in 30 U.S.C. § 902(f). If the usages are read *in pari materia* they imply a reference to medical data or medical standards only. The reference to criteria "applicable under section 223(d) of the Social Security Act" in 30 U.S.C. § 902(f)(1)(C) is instructive. For purposes of determining an applicant's entitlement to Social Security disability insurance benefits, SSA rules employ the term "criteria" to mean medical guides for total disability. 20 C.F.R. §§ 404.1511(a), 404.1525 and Appendix 1 to Subpart P (1987). In 30 U.S.C. § 902(f)(1)(D), the term

See Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

B. The Legislative History Demonstrates that Congress Contemplated the Use of a Different Interim Presumption in Part C Claims

Fairly read, the vast legislative history of the Black Lung Benefits Reform Act of 1977 supports two conclusions: (1) that the Secretary of Labor was not required to include every provision of section 410.490 in the Labor rule, and (2) that the Secretary complies with 30 U.S.C. § 902(f)(2) so long as the Labor rule encompasses the medical bases for invocation employed by SSA.

The original authorizing language directing SSA to adopt an interim presumption describes a two-part standard comprised of "interim evidentiary rules and disability evaluation criteria" or "interim rules and criteria." S. Rep. No. 743, *supra* p. 8 , at 2322-23. Following this format, section 410.490 contains specific disability evaluation criteria (*i.e.*, x-ray, autopsy and biopsy findings or ventilatory test scores), 20 C.F.R. § 410.490 (b)(1), and collateral evidentiary rules, *id.* § 410.490(b)(2), (b)(3), (c). The medical disability criteria give rise to the basic interim presumption of entitlement. The collateral evidentiary rules allocate and shift burdens of proof regarding disease causation and rebuttal, but contain no medical criteria.

The earliest proposals to enlarge the population of claimants who could benefit from an interim presumption extended all parts of the SSA rule to additional claims. A 1974 House proposal would have reopened Part B for six months, and would have required the adjudication of claims filed during this period "on the same basis as if filed on June 30, 1973" (the expiration date of section 410.490).[32] H.R. 17178, 93d Cong., 2d Sess. § 11 (1973). The proposal to adopt this approach generated heated controversy.

"criteria" also directly relates to "criteria for . . . medical tests." *See also Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d at 401.

32. Later proposals employed the same reopening formula. H.R. 7, 94th Cong., 1st Sess. §§ 8,11 (1975); H.R. 8, 94th Cong., 1st Sess. §§ 8, 11 (1975).

Both administering agencies and agency scientists opposed the extension of SSA's rule. *See supra* at pp. 8 - 9. Scientific witnesses representing the American Lung Association and the American Thoracic Society testified that House proposals, including extension of SSA's rules, would require awards of benefits "without regard to sound medical criteria for the determination of such disability. . . . [T]he adoption of these interim criteria would result in the determination of disability in individuals fully capable of . . . active employment." *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 259-60 (1977) (statement of Dr. Hans Weill). Although we do not know to what degree, if any, House proponents were influenced by this testimony, the final House bill settled upon application of the "criteria" of section 410.490 after June 30, 1973. H.R. 4544, 95th Cong., 1st Sess. § 7 (1977).[33]

The Senate did not extend any part of section 410.490 to claims filed after June 30, 1973. S. Rep. No. 209, 95th Cong., 1st Sess. 12-14 (1977), *reprinted in 1977 Legislative History*, *supra* note 12, at 615-17. Instead, the Senate version directed the Department of Labor to write its own eligibility rules, noting "this section does not require nor preclude the blanket incorporation of any provision now a part of existing HEW medical eligibility regulations . . . ." *Id.*

The Conference Committee accepted the Senate approach with the proviso that the Part B "medical standards" were to apply in pending and reopened claims according to regulations designed by the Secretary of Labor and published in the Federal Register. H.R. Rep. No. 864, *supra* p. 10. The Conference Report further emphasized that "all standards are to incorporate the presumptions contained in Section 411(c) of the Act [30 U.S.C. § 921(c)]." *Id.* The statutory presumptions require at least ten years of coal mine employment for their invocation.

33. The House bill proposed dramatic changes in the structure of the program. Among other things, it eliminated a mine owner's right to contest claims, yet retained the mine owner's obligation to pay approved claims. It is apparent that the House bill presented significant questions of constitutional dimension.

When the conference bill was reported back to the House and the Senate, its supporters in each chamber made two points: (1) Labor was expected to use the presumption differently than had SSA; and (2) the identity between the SSA rule and the new Labor Department rule was firm only with respect to "medical" criteria.

Senator Randolph, a conferee, emphasized that Labor was to apply the "interim medical standards" until new regulations were drafted by the Secretary of Labor. 124 Cong. Rec. 2330-31 (1978). Senator Javits, another conferee, reiterated his colleague's emphasis on Labor's obligation to use SSA's "medical criteria." *Id.* at 2333. Senator Javits added:

> The "interim" standards as they were applied to determine benefit claims under Part B, have been highly controversial and widely criticized. For example, the Secretary of Labor on September 30, 1977, stated:
>
> The Part B standards are not medically sound for providing benefits to all deserving individuals.

Id.[34]

In the House, conferees Simon and Perkins engaged in the following colloquy:

> *Mr. Simon*: Mr. Speaker, I would like to ask Chairman Perkins, who also served as chairman of the Conference Committee, if in his opinion this legislation clearly requires that all denied or pending claims subject to the review provisions of the new section 435 [30 U.S.C. § 945] will be subject to reconsideration under the so-called interim medical criteria applicable under Part B of the black lung program?
>
> *Mr. Perkins*: That is the intent of the legislation .... All claims filed before the date that the Secretary of Labor promulgates new medical standards under Part C are subject to evaluation under standards that are no more restrictive than those in effect as of June 30, 1973 .... These are the standards HEW has applied under Part B and they are the precise and only standards HEW will apply to these old claims it must review according to this legislation. As for the Labor Department, it too must apply the interim standards to all of the claims filed under Part C .... We do recognize in the joint explanatory statement that the Secretary of Labor may apply the interim standards to its Part C claims within the context of all relevant medical evidence. But there is no such direction or requirement imposed on HEW .... We expect that HEW will review these old claims according to the same interim criteria it has applied in the past.
>
> I would also add that this legislation gives no authority to the Labor Secretary to alter, adjust, or otherwise change the interim standards .... Insofar as the interim standards address medical criteria, they cannot be made more restrictive.
>
> *Mr. Simon*: ... Mr. Speaker, I am pleased that the language in this bill is crystal clear on the subject of the medical standards ....
>
> * * *
>
> It should not be possible to misconstrue the meaning of this language. The Department of Labor is required to apply medical criteria no more restrictive than criteria being used by [SSA] ....
>
> * * *
>
> So the Secretary [of Labor] is not confined to the medical evidence of the interim criteria and yet may not prescribe criteria more restrictive than the Social Security interim adjudication standards.

Id. at 3431.

Before publication of a proposed Labor Department version of the interim presumption, the draft rule was submitted by the Secretary of Labor to Representatives Perkins, Simon and Dent, the most active and vocal advocates of liberalization. A responding letter signed by the three congressmen stated:

34. Expressing concern for the solvency of the Black Lung Disability Trust Fund, Senator Javits also wanted HEW to change its practices under its interim presumption so that all Part B and Part C claims subject to review under the 1977 amendments would be treated equally. 124 Cong. Rec. 2333. Congressman Perkins wanted HEW to decide cases as it had before, recognizing that the Labor Department would do things differently. 124 Cong. Rec. 3426, 3431 (1978).

> [T]he Committee strongly supports the repromulgation of the interim standards, as found in Section 727.203(a) . . . .
>
> * * *
>
> In Section 727.203(a)(1), DOL follows the exact wording of the interim standards covering x-ray evidence . . . . If a miner-claimant has been engaged in coal mine employment for 10 years and presents an x-ray establishing the presence of pneumoconiosis . . . he may invoke the interim presumption found in Section 727.203(a)(1).

(Pet. App. 44a, 46a.) After the public notice-and-comment period expired, the Secretary of Labor in the Federal Register surveyed the comments on section 727.203 and stated, "the greatest amount of controversy in the comments received has been generated in connection with this section." 43 Fed. Reg. 36,826 (1978). Not a single comment criticized either the Secretary's ten-year requirement or the full rebuttal format provided.

Other factors also played a role in the evolution of section 727.203. Most importantly, it was accepted that disabling black lung disease is virtually unknown in miners with fewer than ten years of coal mine exposure.[35] Second, because the Part C program involves adversarial proceedings under the APA in which private liabilities are adjudicated, the Secretary of Labor had a duty to ensure an acceptable level of fairness in eligibility criteria and rules of evidence. The Secretary of Labor also had a duty to preserve some reasonable level of affordability and predictability, as the Trust Fund was clearly doomed to deficit funding. *See* S. Rep. No. 336, 95th Cong., 1st Sess. 23 (1977).

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35. Available information in 1978 compiled by the National Institute for Occupational Safety and Health showed that 99.3% of miners with fewer than ten years of exposure showed no evidence of black lung disease and that these short-term miners who had the disease had its earliest stage. There is no evidence at all that short-term miners suffer the disabling stages of the disease. *1981 Oversight Hearings*, *supra* note 3, at 32 (attachment to statement of Dr. J. Donald Miller, Director, National Institute for Occupational Safety and Health); *see also Usery*, 428 U.S. at 7 (noting "simple pneumoconiosis ordinarily identified by x-ray opacities of a limited extent is generally regarded by physicians as seldom productive of significant respiratory impairment").

It is reasonable to conclude that the Secretary of Labor had some flexibility in designing the Labor Department rule. Repeated references to the "medical criteria" of the SSA rule and repeated acknowledgments that SSA and Labor would apply their rules differently strongly suggest that the Secretary was bound only to apply SSA's medical criteria. Congress's admonitions that the Secretary of Labor could not ignore relevant medical evidence in designing Labor's rule reflects Congress's intent to permit rebuttal of the Labor presumption. Finally, the rulemaking process itself confirms general satisfaction on the part of Congress and the public with the ten-year requirement and rebuttal provisions of section 727.203.

While not free from doubt, there is no clear proof that either Congress, any member of Congress, or anyone else contemporaneously believed that the Secretary of Labor violated the language or intent of the 1977 amendments in the design and implementation of section 727.203. Although the Third, Fourth and Eighth Circuits were unimpressed by these "ambiguous bits of legislative history," *see Coughlan*, 757 F.2d at 968, the references noted obviously conveyed a message to the Secretary that was accepted by the participants in both the legislative and rulemaking processes. The legislative record supports the validity of the Secretary of Labor's rule.[36]

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36. This conclusion with reference to the ten-year requirement is predicated on the assumption that questions regarding "disease causation" in the context of the presumption are evidentiary or adjudicatory standards and not medical criteria. The Seventh Circuit is of the opinion that disease causation is not, in this context, a medical criterion. *Strike*, 817 F.2d at 404-05. This observation is supported by the fact that "disease causation" in the statute is treated entirely apart from "disability causation" or total disability. *Compare* 30 U.S.C. §§ 902(b), 921(c), 932(h) *with* 30 U.S.C. § 902(f). The SSA interim presumption also treats proof of disease causation as an evidentiary standard and not as medical criteria. One can argue that "disease causation" is a medical criterion, at least in common parlance. The Secretary of Labor's perception that disease causation was not what Congress had in mind when it directed the Secretary to adopt SSA medical criteria resolves this argument. There is a good deal of proof that the Secretary is right and no definitive evidence that his judgment is wrong.

C. The Secretary of Labor's Rule is Valid and Deserves Judicial Deference

The Act confers on the Secretary of Labor the authority to define the term "total disability" for Part C claims. 30 U.S.C. § 902(f)(1), (2). The Secretary promulgated these eligibility rules. In reviewing similar grants of authority, this Court has held "[w]here ... the statute expressly entrusts the Secretary with the responsibility for implementing a provision by regulation, our review is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious." *Bowen* v. *Yuckert*, 107 S. Ct. 2287, 2293 (1987) (quoting *Heckler* v. *Campbell*, 461 U.S. 458, 466 (1983)). This Court has consistently accorded weight to an agency's construction of its own statute and deferred to the agency's accommodation of conflicting policies "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *United States* v. *Shimer*, 367 U.S. 374, 383 (1961); *accord Chevron, U.S.A.*, 467 U.S. at 845. This Court's traditional test validates section 727.203.

The plain language of section 902(f) is less than clear. If, in isolation, the term "criteria" in subsection 902(f)(2) has broad general meaning, the context of the Act and particularly the whole of section 902(f) prompt further inquiry. Section 902(f) addresses criteria for "total disability," while the identity of the compensable disease and disease causation are addressed elsewhere. *See* 30 U.S.C. §§ 902(b), 921(c).[37] The meaning of section 902(f)(2) must be harmonized with all other provisions of the Act. This is enough to justify resort to the legislative history, if the inherently imprecise term "criteria" does not do so on its own accord.[38] *See INS* v. *Cardoza-Fonseca*, 107 S. Ct.

37. Regulatory authority to define "total disability" appears only in section 902(f). Regulatory authority addressing disease causation and diagnosis is conferred in 30 U.S.C. §§ 923(b), 932(h), 936(a).

38. Indeed, the broadest construction of "criteria" in section 902(f)(2) does not limit the term to regulations, but would encompass all sources employed in SSA adjudications, including program bulletins, manuals, SSA rulings, and internal operating procedures. Not only would it be impossible to reconstruct all of these "criteria," but it also would be manifestly unjust to require mine operators to litigate questionable claims in a setting that does not contemplate true adversity. *Cf. Richardson* v. *Perales*, 402 U.S. 389, 403 (1971).

1207, 1221 & n.30 (1987). The lack of clarity in section 410.490 as well as the probability that the rule itself violates the statute, *see* 30 U.S.C. §§901(a), 902(f)(1)(A), 923(b), merit resort to external sources.

The Secretary's interpretation should be upheld so long as it is rational and consistent with the statute. *NLRB* v. *United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987). The Secretary's ten-year rule and full rebuttal format pass muster on both accounts. *Cf. Mullins Coal*, 108 S. Ct. at 440. All relevant considerations support this conclusion. With respect to the rebuttal provisions of section 727.203, the legislative history is quite clear. It directs the Secretary of Labor to terminate SSA's practice of ignoring evidence unfavorable to claimants and write a rule providing for rebuttal of presumed facts. *See supra* pp. 9-10. No less is conscionable in an adversarial proceeding.

The Secretary's uniform ten-year rule for invocation is validated by the evolution of the statutory language and intent from 1973-1978, the course of the debate over these years, specific references to "medical" criteria in the statements of key members of Congress, the scientific proof amassed by Congress demonstrating no evidence of totally disabling pneumoconiosis in short-term miners, and the Labor Department's intimate involvement in the legislative process through the terms of three congresses. If no one indicia is ultimately persuasive, the five in concert are determinative.

In addition, the Secretary's rule was submitted for approval and was approved by the most vigorous congressional advocates of a generous program—the very same members who led the movement to have Labor apply an interim presumption. The rule was contemporary with enactment, and its provisions were consistently and invariably applied by the agency. *See United States* v. *National Association of Securities Dealers*, 422 U.S.

694, 719 (1975). The Department participated in the drafting of the Act. *See Miller* v. *Youakim*, 440 U.S. 125, 144 (1979). And in the course of comprehensive reviews in 1980 and 1981,[39] including a careful reconsideration of benefit eligibility standards, not only did Congress fail to find fault with Labor's usage, but none of the many interested constituencies that testified found cause to criticize it. *See United States* v. *Rutherford*, 442 U.S. 544, 554 & n.10 (1979).

In sum, all traditional canons of interpretation and deference support the Secretary's rule. Conclusions to the contrary reached by the courts below are impressionistic at best and assume, incorrectly, that in the case of a rule like section 727.203, the agency's long-standing and consistent view and contemporaneous understanding of its mission are entitled to little consideration. The rule should be sustained.

D. Section 410.490 Cannot be Applied to Impose Liability on Coal Mine Owners Under the Due Process Clause of the Fifth Amendment

It is one thing for the Government to compensate miners from federal funds as a matter of congressional policy, but it is a far different thing to "take" compensation from a mine owner without a reasonable basis for imposing such liability. Presumptions pass constitutional muster if there is "some rational connection between the fact proved and the ultimate fact presumed." *Mullins Coal*, 108 S. Ct. at 440 n.32 (quoting *Mobile, Jackson & Kansas City R.R. Co.* v. *Turnipseed*, 219 U.S. 35, 43 (1910)). The test is assuredly an easy one to meet, requiring the invalidation of a presumption only if it is found to be "purely arbitrary." *Usery*, 428 U.S. at 30. In *Usery*, the statutory presumptions requiring ten or fifteen years of coal mine employment were easily sustained under this standard. SSA's rule and, if read according

39. *See 1981 Oversight Hearings*, *supra* note 3; *Report and Recommendation of the Subcomm. on Oversight of the Comm. on Ways and Means, U.S. House of Representatives on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. (1981).

to *Broyles*, its statutory predicate in 30 U.S.C. § 902(f)(2) are not so easily disposed of under this traditional test.

SSA's rule is invoked by chest x-ray, autopsy or biopsy evidence showing any stage, including the most minimal stage of black lung disease, or by ventilatory studies meeting specified values. Once invoked, it presumes that the miner is totally disabled or died due to black lung disease. 20 C.F.R. § 410.490(b). This presumption can only be rebutted by proof that the miner is working or able to work. *Broyles*, 824 F.2d at 329. Rebuttal is precluded if the miner is unable to work because of non-occupational conditions, such as a back injury, cigarette smokers' bronchitis, *York* v. *Benefits Review Board*, 819 F.2d 134 (6th Cir. 1987), a stroke, *Roberts* v. *Benefits Review Board*, 822 F.2d 636 (6th Cir. 1987), or nothing in particular, *see Adkins* v. *Department of Labor*, 824 F.2d 287 (4th Cir. 1987).[40] Under the *Usery* test, the results here are constitutionally permissible only if the facts proven bear some relationship to the ultimate conclusions dictated by the presumption. They clearly do not.

Under the Due Process Clause, section 410.490 may be sustained as applied to mine owners as a rebuttable presumption if the rational connection test is satisfied, or it may be sustained as an irrebuttable presumption so long as it is not "wholly unreasonable" or "irrational." *Usery*, 428 U.S. at 23-26. Section 410.490 fails both tests. Either inquiry turns on the operation and effect of section 410.490. *Id.* at 24.

The SSA rule presumes total disability based on proof of simple pneumoconiosis. A positive chest x-ray is not conclusive proof of pneumoconiosis much less occupationally caused disability. *See supra* note 24. A positive chest x-ray that shows occupationally induced disease at its early stages does not suggest that the miner is disabled or even impaired. *Usery*, 428 U.S. at 7. For

40. These cases were decided under 20 C.F.R. § 727.203(b)(2), which is the equivalent of 20 C.F.R. § 410.490(c)(2). In Labor's rule, the rebuttal inquiry can move on to address whether pneumoconiosis contributed to the miner's disability or death, or whether the miner has pneumoconiosis. 20 C.F.R. § 727.203(b)(3), (4). Under SSA's rule, the road ends after it is established that the miner is not working or able to work.

a miner with fewer than ten years of exposure, uncontradicted proof presented to Congress showed that disabling occupational disease is virtually impossible. *See supra* note 35.

More significantly, with respect to ventilatory test invocation, the uncontradicted testimony received by Congress from government physicians, the American Lung Association, the American Thoracic Society, and the American College of Chest Physicians demonstrates that the ventilatory test criteria are basically normal values for retired coal miners.[41] *See supra* p.23. The science of the matter is not arguable.[42] Moreover, ventilatory test results measure impairment only and are not in any sense diagnostic of occupational disease.[43]

Thus, under SSA's rule, a miner without impairment or disease may be presumed to be totally disabled due to occupational disease, and the presumed facts may be rebutted only if the miner is working or able to work. If the miner is unable to work because of a non-occupational ailment, rebuttal of SSA's rule is precluded. *See Haywood* v. *Secretary of HHS*, 699 F.2d 277, 283, 285 (6th Cir. 1983).[44]

If viewed as a rebuttable presumption, section 410.490 presumes that a person who either has no disease or minimal disease, or who has no true impairment much less a totally disabling impairment, is totally disabled by occupational disease. Were the presumed facts rebuttable, as they are under section

41. During the notice and comment period on Labor's rule, Dr. Ross Kory, the scientist who did the basic research for the U.S. Army from which the ventilatory values were derived, wrote: "It is difficult for me to understand how any honest, knowledgeable, responsible scientific physician could be a party to such unscientific and invalid standards, no matter how compassionate their intent . . . ." Letter from Ross C. Kory, M.D., Professor of Medicine, University of South Florida College of Medicine, to Robert B. Dorsey, U.S. Department of Labor (June 25, 1978).

42. Those who testified in favor of the criteria did so purely from a policy perspective. *See* H.R. Rep. No. 151, *supra* note 12, at 80-84, 94-96 (minority views and separate views of Rep. Erlenborn).

43. A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Disease* 4-5 (1986).

44. The Sixth Circuit does not apply the *Haywood* Part B standard in cases arising under section 727.203. *Ramey*, 755 F.2d at 490.

727.203, there would be no valid due process objection. *See Lavine* v. *Milne*, 424 U.S. 577, 585 (1976). But the presumed facts are not rebuttable. There is no rational connection between normal ventilatory tests and the fact that a miner is not working or unable to work because of a back injury, for example.[45] There is no rational basis for imposing liability on a mine owner in the case of a short-term miner on account of an x-ray showing trivial disease, likely to have no effect on the miner's life or on the miner's survivors. *See Usery*, 428 U.S. at 26. There is no rational basis for imposing liability on a mine owner for events in the miner's life causing a termination of coal mine employment (including retirement or old age) in which the mine owner played no role. If section 410.490 is viewed as a rebuttable presumption, the connection between the facts proven and those that are actually presumed is invisible. *See Developments in the Law: Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1643 (1986).

If SSA's rule is tested as a mandatory inference, the question is whether it is minimally rational to require employers to pay benefits to miners with largely normal pulmonary capabilities or minimal evidence of possible occupational disease, because they are not working, or cannot work, for whatever reason. The prior employment relationship coupled with some trivial impairment of health might satisfy the test of reason,[46] but the equivalence breaks down where the truth, if known, would show that the impairment was not in any way caused by the party obligated to

45. It is conceded, of course, that some claimants will invoke the presumption with truly abnormal ventilatory status or significant x-ray evidence, but even in those cases, on an individual level, reason fails to support the presumption if the claim defendant is prohibited from proving that the abnormal test results are totally unrelated to mining exposure, as is often the case.

46. In *Usery*, this Court sustained the irrebuttable rule of entitlement in section 411(c)(3) of the Act, 30 U.S.C. § 921(c)(3), on the grounds that impairment of health alone could sustain the provision. 428 U.S. at 23. But that provision compensates only those who have "complicated" pneumoconiosis, a manifestation of the disease that is indisputably severe and sometimes fatal. Section 411(c)(3) is supported by congressional findings of the seriousness of this stage of the disease. There are no findings that reason out the basis for the mandatory compensation of a health abnormality of no particular consequence to the person affected.

pay. That makes the truth irrelevant as a matter of law.[47] Facts proven by the methods prescribed in SSA's rule have little or, most likely, no connection with totally disabling pneumoconiosis.

This Court has observed that the validity of evidentiary devices under the Due Process Clause depends "on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the fact finders' freedom to assess the evidence independently." *County Court* v. *Allen*, 442 U.S. 140, 156 (1979). Under SSA's rule, the basic and elemental facts are largely unrelated and the fact finder has no freedom to assess relevant evidence.[48] If SSA's rule is applied in cases involving an employer's liability, it makes the mine owner the primary insurer of a miner's unemployment, general disability, or death, without the necessary connection between the employment relationship and the obligation imposed. For mine owners, SSA's rule compels liability without due process of law.

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47. In 1980, the Comptroller General informed Congress that "in 88.5% of the cases [awarded under the SSA rule], medical evidence was not adequate to establish disability or death from black lung." Comptroller General of the U.S., *Report to the Congress: Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability* 8 (1980).

48. *Broyles* is exemplary. Broyles has heart disease. The ALJ also found that Broyles has the earliest possible stage of pneumoconiosis, which one physician attributed to his five years of coal mine work. Under section 410.490, the presumption was invoked. The ventilatory and blood gas testing is largely normal. The below normal results on certain aspects of the tests were attributed by the physicians to either invalid testing or poor cooperation. Another physician commented on the relative severity of Broyles' lung disease and heart disease, concluding that his heart disease alone is disabling and his black lung disease is not (Broyles App. 12a-14a). Both physicians agreed that Broyles is disabled by significant arteriosclerotic heart disease. Under SSA's rule, as the Fourth Circuit correctly notes, the ALJ simply may not consider the uncontradicted evidence that Broyles is not within the eligibility parameters of the statute. Under section 410.490, Broyles must be awarded benefits for his nonoccupational heart disease.

II.

THE EIGHTH CIRCUIT HAS NO AUTHORITY TO MANDATE THE RELITIGATION OF TENS OF THOUSANDS OF PREVIOUSLY DENIED AND CLOSED CLAIMS

A. Longshore Act Procedures Apply

Following disruptive litigation in 1976 and 1977,[49] Congress reaffirmed its intent that all Part C claims are to be adjudicated under the Longshore Act. 33 U.S.C. §§ 919, 921, *incorporated into* 30 U.S.C. § 932(a).[50] In accordance with Longshore Act procedures and agency rules, Part C claims are filed with a Department of Labor deputy commissioner. Procedures provide the claimant with several opportunities to prove entitlement. If initial submissions do not justify an award, the claimant is afforded sixty days to submit more evidence or request a hearing. 20 C.F.R. § 725.410(c). If no action is taken with sixty days from the notice, the claim is denied by reason of abandonment. *Id.* If the claim is pursued, the mine operator becomes actively involved, *id.* §§ 725.412-.415, and after consideration of a more complete record, the deputy commissioner issues a proposed decision and order, *id.* § 725.418. The parties have thirty days to respond and may accept the decision, request further informal proceedings or an APA hearing. *Id.* § 725.419. If there is no response in the period allowed, the proposed decision and order becomes final. *Id.*; 33 U.S.C. § 921(a).

If requested by a party, the case is forwarded to an ALJ for an APA hearing. 33 U.S.C. § 919(d), *incorporated into* 30 U.S.C. § 932(a); 20 C.F.R. § 725.455. "There shall be no right to a hearing in a claim with respect to which a determination of a claim made by the deputy commissioner has become final and effective in accordance with this part." 20 C.F.R. § 725.450. The hearing is de novo and on the record. After hearing, the ALJ

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49. *See, e.g., Director, Office of Workers' Compensation Programs* v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977).

50. *See* H.R. Rep. No. 864, *supra* p. 10, at 23.

issues a decision awarding or denying benefits. The decision is filed and becomes final thirty days thereafter unless appealed. 33 U.S.C. § 921(a). Appeals are taken to the Benefits Review Board and then to the circuit courts. 33 U.S.C. § 921(b), (c).

Any claimant whose claim was denied may seek a readjudication within one year from the date of the denial by proving either a mistake of fact or a change in conditions. 33 U.S.C. § 922; *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). While the passage of more than one year from a denial of a claim extinguishes that cause of action, a denied claimant may begin a new cause of action by filing an entirely new claim and proving a "material" change in conditions.[51] 20 C.F.R. § 725.309(c), (d).

Section 21(e) of the Longshore Act provides that "proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, *shall not be instituted otherwise as provided in this section*, and section 18." 33 U.S.C. § 921(e) (emphasis added).[52] Many of the cases in the *Sebben* class were denied by a deputy commissioner, many were denied by an ALJ, and the remainder were finally denied by the Benefits Review Board or a circuit court. These cases do not present the circumstances necessary to invoke district court jurisdiction as provided by section 21(e) of the Longshore Act.

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51. The new claim is, of course, adjudicated under eligibility criteria applicable on the date of its filing. 20 C.F.R. §§ 718.1, 718.2. Thus, all claimants within the *Sebben* class may file a new claim at this time if there has been a material change in conditions since denial of a prior claim, but the new claim would not be considered under the Department of Labor interim presumption. No interim presumption may apply in any claim filed after March 31, 1980. 20 C.F.R. § 718.2.

52. Section 21(d) of the Longshore Act authorizes a district court to enforce compliance with a final order "[i]f the court determines that the order was made and served in accordance with law . . . ." Section 18 of the Longshore Act authorizes a district court to enter a default judgment against an employer that has refused to pay an award. Neither section 18 nor 21(d) permits the district court to disturb the order itself.

B. The Longshore Act Bars the Relitigation of Closed Claims

Where Congress establishes comprehensive statutory review procedures governing the litigation of a particular subject matter, "those procedures are to be exclusive," even if Congress has not said so. *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965). Longshore procedures are comprehensive and complete.[53] Congress has expressly provided that they shall be exclusive. 33 U.S.C. § 921(e). This Court has recognized that the Longshore Act scheme divests the district courts of the traditional bases for jurisdiction in matters arising under it. *Crowell* v. *Benson*, 285 U.S. 22, 46-47, 50-53 (1932).[54]

The circuit courts have consistently and, before *Sebben*, uniformly held that the district courts have no jurisdiction to consider Part C claims issues.[55] Further, the circuit courts have consistently held that the Longshore Act's time limitations are

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53. All privately funded workers' compensation programs administered by the Department of Labor are governed by the Longshore Act. In addition to the Longshore Act and the Black Lung Benefits Act, these include the Defense Base Act, 42 U.S.C. § 1651, the War Hazards Compensation Act, 42 U.S.C. §§ 1701-1717; the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331; the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171; the District of Columbia Workers' Compensation Act, for claims filed prior to July 1, 1980. 36 D.C. Code §§ 501-504 (1973 ed.) (repealed).

54. Although Longshore procedures have changed since *Crowell*, the principle announced there has ever greater force today. In a recent unpublished opinion, the District of Columbia Circuit observed, "In 1972, however, Congress amended 33 U.S.C. § 921 to specifically remove district court jurisdiction, create the Benefits Review Board, and to provide for direct review of final Board orders in the court of appeals . . . ." *Lumberman's Mutual Casualty Co.* v. *Brock*, No. 86-5718, slip op. at 5 (D.C. Cir. Mar. 24, 1987) (unpublished). *See City of Rochester* v. *Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979).

55. *See Connors* v. *Tremont Mining Co.*, 835 F.2d 1028 (3rd Cir. 1987) (Longshore Act precludes federal question jurisdiction under 28 U.S.C. § 1331, and under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461); *Louisville and Nashville R.R. Co.* v. *Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984) (Longshore Act precludes jurisdiction under 28 U.S.C. §§ 1301, 1337, and 1361); *Compensation Dep't of Dist. Five, United Mine Workers of America* v. *Marshall*, 667 F.2d 336 (3d Cir. 1981) (Longshore Act precludes jurisdiction under 28 U.S.C. §§ 1331, 1361 and 5 U.S.C. § 702).

jurisdictional and may not be waived for any reason.[56] The Iowa district court was correct in holding that it had no jurisdiction to intrude. The Eighth Circuit has violated the express mandate of the statute in holding to the contrary.

The Eighth Circuit did so solely on the authority of this Court's decision in *Bowen* v. *City of New York*, 106 S. Ct. 2022 (1986). *Bowen* is not analogous. There, SSA denied disability insurance claims under a "clandestine" policy that conflicted with applicable regulations as well as the plain language of the Social Security Act. Persons affected were, as a result of the internal policy, deprived of the ability to fairly prove their claims or appeal denials in response to the policy. The lower court directed SSA to reopen and readjudicate claims denied under the secret policy. This Court noted that the time limits imposed under the Social Security Act for the exhaustion of administrative remedies are waivable, not jurisdictional, periods of limitation. Indeed, the Social Security Act so provides. 42 U.S.C. § 405(g). Because of the obvious unfairness of SSA's policy, this Court concluded that for some SSA claimants in the class, an equitable tolling of the SSA time limitations was justified and, for others, lifting the exhaustion requirement was appropriate. *Bowen* v. *City of New York*, 106 S. Ct. at 2031-32.

Although the Social Security Act authorizes a waiver of time limitations, the Longshore Act does not. Section 21(a) of the Longshore Act provides that "[a] compensation order shall become effective when filed in the office of the deputy commissioner . . . and, unless proceedings for the suspension or setting

56. *See Arch Mineral Corp.* v. *Director, Office of Workers' Compensation Programs*, 798 F.2d 215 (7th Cir. 1986); *Midland Insurance Co.* v. *Adam*, 781 F.2d 526 (6th Cir. 1985); *Dawe* v. *Old Ben Coal Co.*,754 F.2d 225 (7th Cir. 1985); *Clay* v. *Director, Office of Workers' Compensation Programs*, 748 F.2d 501 (8th Cir. 1984); *Bennett* v. *Director, Office of Workers' Compensation Programs*, 717 F.2d 1167 (7th Cir. 1983); *Wellman* v. *Director, Office of Workers' Compensation Programs*, 706 F.2d 191 (6th Cir. 1983); *Insurance Company of North America* v. *Gee*, 702 F.2d 411 (2d Cir. 1983); *Blevins* v. *Director, Office of Workers' Compensation Programs*, 683 F.2d 139 (6th Cir. 1982); *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *aff'd on other grounds sub nom. Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 244 (1977).

aside of such order are instituted as provided in subdivision (b) of this section, *shall become final at the expiration of the thirtieth day thereafter*." 33 U.S.C. § 921(a) (emphasis added). This provision does not permit a waiver of the time limitations. Its language is mandatory. Similarly, section 21(c) cuts the district courts out of the proceedings and reflects the jurisdictional nature of the time limitations on a party's access to the courts. 33 U.S.C. § 921(c). It provides that a party dissatisfied with an order of the Board may obtain review in the circuit court "by filing in such court within sixty days a written petition praying that the order be modified or set aside" and *"[u]pon such filing, the court shall have jurisdiction of the proceeding." Id.* (emphasis added).

There is no language in these provisions that allows equitable waiver. The Eighth Circuit overlooks this point and assumes that the principle of *Bowen* v. *City of New York* is freely applicable outside the Social Security Act. *Bowen* suggests no such conclusion. As a matter of sound judicial policy, the freewheeling waiver of jurisdictional limitations is wholly incompatible with the rights of the private parties obligated to pay benefits in black lung or longshore claims. *See Crowell*, 285 U.S. at 47. In *Crowell*, this Court observed:

> The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the [compensation] plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent, and consequences of the employee's injuries and the amount of compensation that should be awarded.

Id.

The Black Lung/Longshore scheme presented here stands in stark contrast to that reviewed in *Bowen*. Section 21(e) of the Longshore Act precludes traditional bases for district court jurisdiction outside of prescribed statutory procedures. Section 21(e) is not an exhaustion provision; it is a prohibition that the

Eighth Circuit clearly violated in *Sebben*. Even if it were possible to overcome the jurisdictional prohibition of section 21(e), or to find a basis for waiver of exhaustion requirements, the Pittston Coal Group and co-petitioners do not waive exhaustion in those claims involving their potential liabilities. It would, at this late date, be impossible to defend many of those claims.

Were this Court to find statutory comparability between the Longshore Act and the Social Security Act, the circumstances presented here are not at all similar to those in *Bowen* v. *City of New York*. Nothing was hidden in the Labor Department's promulgation of section 727.203. It is a published rule and was the subject of extensive notice and comment. Its ten-year requirement is not ambiguous. Any claimant with fewer than ten years of coal mine employment had ample opportunity either to challenge the requirement[57] or to prove eligibility by alternative means. 20 C.F.R. § 727.203(d); *see also Carozza* v. *United States Steel Corp.*, 727 F.2d 74, 77 (3d Cir. 1984). The fact that any particular claimant failed to pursue these avenues is in no way the responsibility of the Labor Department and does not justify the exceptionally onerous consequences of *Sebben* for mine owners, state insurance funds, or commercial insurers.

C. The *Sebben* Claims Are Also Barred By Res Judicata

The Longshore Act establishes a principle of finality of decision that has been recognized by this Court. *Crowell*, 285 U.S. at 47-58. This principle is dispositive of this case. The Eighth Circuit ignored this principle and erred in doing so. Res judicata also should be applied to accomplish a just result.

"There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*'." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). Res judicata applies to the actions of administrative agencies if (1) the agency is acting

57. The Benefits Review Board first addressed the issue in 1981 in *Lynn* v. *Director, Office of Workers' Compensation Programs*, 3 Black Lung Reporter (MB) 1-125 (Benefits Review Board 1981), and presumably ALJs were presented with the question well before that.

in a judicial capacity, (2) the agency properly resolves disputed issues of fact, and (3) the parties have had an adequate opportunity to litigate. *University of Tennessee* v. *Elliott*, 106 S. Ct. 3220, 3226 (1986); *see also United States* v. *Utah Constr. and Mining Co.*, 384 U.S. 394, 421-422 (1966). The treatises are in accord.[58] *See* 4 K. Davis, Administrative Law Treatise § 21.9, at 78 (2d ed. 1983); Restatement (Second) of Judgments § 83, at 269 (1982).

In black lung claims there is no doubt that the agency is acting in a judicial capacity. As to the previously denied claims in the *Sebben* class, there is no suggestion that the agency failed to resolve disputed facts or failed to provide the claimant an adequate opportunity to litigate. Each claimant in the *Sebben* class had more than ample opportunity to prove the existence of total disability or death due to black lung disease. Each failed in that proof, many before ALJs and on appeal. Many times employer's counsel produced substantial proof of ineligibility. Many of these cases were concluded long ago. It is manifestly unfair to direct the Department of Labor and the employers simply to do it over. This is a nearly perfect administrative setting for application of the principle of res judicata, and the logic of the principle is well served here.[59]

58. The legislative history of the Administrative Procedure Act also evidences a strong policy in favor of the finality of decision. H.R. Rep. No. 1980, 79th Cong., 2d Sess., app. A at n.21 (1946), *reprinted in* Senate Comm. on the Judiciary, *Legislative History of the Administrative Procedure Act*, 79th Cong., 2d Sess. 289 (1946). "A party cannot willfully fail to exhaust his administrative remedies . . . . If he so fails he is precluded from judicial review . . . ." *Id.*

59. The Solicitor General observes in his petition for a writ of certiorari in *Sebben* that the authorities might not extend res judicata to questions of law arising in administrative litigation. Petition at 15 n.14. It does extend so far in judicial proceedings. *Moitie*, 452 U.S. at 398. Whether a claimant's eligibility for black lung benefits is a question of law or fact is debatable, but there is no reason why res judicata should be restricted to only fact determinations in an administrative proceeding. Its logic applies to the whole case. *See Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971) (regarding the retroactive application of judicial decisions altering a legal standard).

Res judicata does not apply if it "would be incompatible with a legislative policy." Restatement (Second) of Judgments § 83(4) (1982). The exception plainly does not apply. There is no legislative policy apparent in the Black Lung Act or Longshore Act evidencing an intent to permit the repeated litigation of claims. Abundant statutory language precludes this result. In a broader sense, it may be argued that there is a legislative policy directing the review of *Sebben* class claims under section 410.490. The existence of such a policy, however, is far from clear.

Congress authorized the Labor Department to write its own presumption. Congress mandated that the Labor rule was to be fully rebuttable, although SSA's was not. Congress and Labor had a constitutional duty to design a reasonable rule that at least minimally preserved a rational connection between proven and elemental facts. Although Congress required the reopening of many of these claims under 30 U.S.C. § 945, each of these was reopened and readjudicated under more liberal eligibility rules. It is highly unlikely, and indeed there is no indication, that Congress wanted further readjudications to be available as the courts refined and interpreted these new rules.

The policy favoring res judicata easily overcomes the unsubstantiated suggestion that the Act mandates relitigation whenever some new judicial interpretation gives claimants a still greater advantage. A contrary conclusion robs the fundamental principle of finality of considerable meaning and is a disruptive and troubling course upon which to begin.

D. The Mandamus Statute Neither Confers Jurisdiction on the District Court Nor Provides a Proper Remedy

The Longshore Act precludes district court jurisdiction under 28 U.S.C. § 1361. *Donovan*, 713 F.2d at 1245. One major purpose of the 1972 amendments to the Longshore Act was to terminate the procedure by which district courts reviewed the actions of the Secretary by writ of mandamus. *Director, Office of Workers' Compensation Programs* v. *Eastern Coal Corp.*, 561

F.2d 632, 638 (6th Cir. 1977). Under the Longshore Act, district courts may take jurisdiction only to enforce awards. In matters subject to the Longshore Act, there simply is no way for district courts to invoke the mandamus statute because the courts do not have any statutory basis on which to do so.[60]

Even if the district court could take jurisdiction under 28 U.S.C. § 1361, mandamus relief is inappropriate in these circumstances. *See Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984). It has long been the law that a writ of mandamus may not issue to compel agency action "[w]here judgment or discretion is reposed in an administrative agency and has by that agency been exercised." *United States ex rel. Chicago Great W.R.R. Co.* v. *ICC*, 294 U.S. 50, 60 (1935). This remedy is restricted "in the main, to situations where ministerial duties of a nondiscretionary nature are involved .... [W]here the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion." *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958). This Court has repeatedly imposed a heavy burden on a party seeking mandamus, requiring a showing of a "clear and indisputable" right to issuance. *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 108 S.Ct. 1133, 1143 (1988) (quoting *United States* v. *Duell*, 172 U.S. 576, 582 (1899)).[61]

In this case, the Secretary of Labor was instructed to write a set of regulations defining the term "total disability." 30 U.S.C. § 902(f)(1). The definition was to take into account five express restrictions, 30 U.S.C. § 902(f)(1)(A)-(D), (f)(2), and to

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60. For this same reason, class certification is improper. *See Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979).

61. The Brief of Respondents in Opposition at 21-22 suggests the standard for granting mandamus, at least in the circuits, has eased somewhat in recent years. While SSA matters appear to present occasional circumstances that are treated differently, there is no evolutionary trend diminishing the generally exceptional nature of the writ. *See Allied Chemical Corp.* v. *Diaflon, Inc.*, 449 U.S. 33, 36 (1980); *Maczko* v. *Joyce*, 814 F.2d 308, 310 (6th Cir. 1987); *Azurin* v. *vonRaab*, 803 F.2d 993, 995 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 3264 (1987).

blend into the ultimate rules at least three statutory presumptions and several statutory rules of evidence, 30 U.S.C. §§ 921(c)(1), (2), (4), 923(b). The entitlement equations settled upon by Congress emerged from a history of heated controversy and may not have reflected a clear meeting of the minds between the House and Senate. The course the Secretary had to follow was hardly free from doubt or clearly nondiscretionary. *See Chevron, U.S.A.*, 467 U.S. at 842-44. Hundreds of people representing the views of the agency, congressional committees involved, and diverse constituencies participated in both the statutory and regulatory process. Throughout this process, Labor provided key members of Congress the opportunity to specially comment on the regulatory product. Consigning virtually all this to irrelevancy, the *Sebben* court declared the Secretary of Labor's careful effort to have been misguided. It invoked mandamus powers to fashion its own regulatory product, nine years after the fact, without the jurisdiction or authority to do so.

The Act did not direct the Secretary to adopt section 410.490; the Secretary clearly had room for the exercise of discretion. The Secretary exercised this discretion to accommodate important competing interests, statutory requirements, scientific considerations, and the rights of all parties. This classic exercise of discretion is not subject to the mandamus powers of the district courts. To hold otherwise reduces the extraordinary writ of mandamus to an ordinary remedy and justifies judicial intervention into basic agency decisionmaking to a degree not contemplated within our system of governance.

CONCLUSION

The judgment of the Fourth Circuit, insofar as it holds invalid the Secretary of Labor's interim presumption, should be reversed. The judgment of the Eighth Circuit ordering the Secretary of Labor to readjudicate tens of thousands of previously denied and closed black lung claims should be reversed as well.

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PITTSTON COAL GROUP, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

ANN MCLAUGHLIN, SECRETARY OF LABOR, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

CHARLIE BROYLES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND EIGHTH CIRCUITS

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QUESTIONS PRESENTED

1. Whether Section 402(f)(2) of the Black Lung Benefits Act, which provides that the "criteria" applied to certain claims adjudicated by the Secretary of Labor "shall not be more restrictive" than the criteria applied by the Secretary of Health, Education, and Welfare (HEW) to claims filed during an earlier period, requires that, in addition to applying medical criteria no more restrictive than HEW's, the Department of Labor also must apply evidentiary rules and adjudicatory standards no more restrictive than HEW's.

2. Whether the Eighth Circuit erred in holding that a writ of mandamus should issue directing the Secretary of Labor to reopen thousands of claims for black lung benefits that had been finally denied before that court concluded that the Secretary had erroneously construed Section 402(f)(2).

PARTIES TO THE PROCEEDING

In addition to James Sebben (whose actual name, Seddon, has been misspelled throughout this litigation), John Cossolotto, Bruno Lenzini, and Charles Tonelli, on behalf of themselves and all others similarly situated, brought suit in the United States District Court for the Southern District of Iowa; they are respondents in both No. 87-821 and No. 87-827. They named as defendants the Secretary of Labor (currently Ann McLaughlin, who replaced Dennis E. Whitfield, the Deputy Secretary of Labor, and William E. Brock, III, the former Secretary of Labor), the Department of Labor, and Steven Breeskin, Deputy Commissioner of the Department's Division of Coal Mine Workers' Compensation; the defendants are petitioners in No. 87-827. Pittston Coal Group, Barnes & Tucker Company, Island Creek Coal Company, Consolidation Coal Company, Old Republic Insurance Company, and Pennsylvania National Insurance Group intervened in the Eighth Circuit; they are petitioners in No. 87-821.

In addition to the petitioner, the Director of the Department of Labor's Office of Workers' Compensation Programs, and respondent Charlie Broyles, Lisa Kay Colley is a respondent in No. 87-1095.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-821

PITTSTON COAL GROUP, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

No. 87-827

ANN MCLAUGHLIN, SECRETARY OF LABOR, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

No. 87-1095

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

CHARLIE BROYLES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND EIGHTH CIRCUITS

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the Eighth Circuit in *Sebben* (87-827 Pet. App. 1a-18a) is reported at 815 F.2d 475. The opinion

of the United States District Court for the Southern District of Iowa (87-827 Pet. App. 19a-22a) is unreported.

The opinion of the Fourth Circuit in *Broyles* (87-1095 Pet. App. 1a-6a) is reported at 824 F.2d 327. The decisions of the Benefits Review Board (87-1095 Pet. App. 7a-9a (*Broyles*) and 18a-21a (*Colley*)) are unreported, as are the decisions of the administrative law judges (87-1095 Pet. App. 10a-17a (*Broyles*) and 22a-28a (*Colley*)).

JURISDICTION

The judgment of the Eighth Circuit in *Sebben* was entered on March 25, 1987. The order denying the Secretary's petition for rehearing was entered on June 25, 1987 (87-827 Pet. App. 23a). The order denying the intervenors' petition for rehearing was entered on July 24, 1987 (87-821 Pet. App. 18a). On September 17, 1987, Justice Blackmun extended the time for filing petitions for a writ of certiorari to and including November 20, 1987. Both the Secretary's and the intervenors' petitions were filed on that date. This Court granted the petitions and consolidated them on February 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the Fourth Circuit in *Broyles* was entered on July 31, 1987. A petition for rehearing was denied on September 30, 1987 (87-1095 Pet. App. 29a-30a). The petition for a writ of certiorari was filed on December 29, 1987. The Court granted the petition and consolidated it with Nos. 87-821 and 87-827 on April 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), HEW's "interim" regulation, 20 C.F.R. 410.490, and Labor's "interim" regulation, 20 C.F.R. 727.203, are reprinted in the appendix to this brief (App., *infra*, 1a-8a).

STATEMENT

1. *Statutory and regulatory framework.* Under the Black Lung Benefits Act,[1] 30 U.S.C. (& Supp. III) 901 *et seq.*, "[d]isability benefits are payable to a miner if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment." *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs,* No. 86-327 (Dec. 14, 1987), slip op. 5.[2] Claims for benefits are adjudicated under two programs, depending on the date the claim was filed. Claims filed before July 1, 1973,

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[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792, was amended by and became known as the Black Lung Benefits Act in 1972. See Pub. L. No. 92-303, 86 Stat. 150, 30 U.S.C. (& Supp. III) 901 *et seq.* It subsequently was amended by the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643, the Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635, and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a) and (d), 100 Stat. 312, 313.

[2] Pneumoconiosis is a lung disease caused by exposure to various types of dust, such as coal mine dust and asbestos. See Lopatto, *The Federal Black Lung Program: A 1983 Primer,* 85 W. Va. L. Rev. 677, 679 & n.13 (1983). When caused by coal mine dust, it is known as black lung disease. The statute (30 U.S.C. 902(b)) and the regulations (20 C.F.R. 410.401(b), 727.202, 718.201) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment. For clarity, we will use "pneumoconiosis" to refer solely to the disease, treating the question of causation as distinct, as did this Court in *Mullins Coal Co.*

under Part B of the Act, were considered by the Department of Health, Education, and Welfare (HEW), and benefits were paid from the general revenues of the United States. 30 U.S.C. 922(a), 924. Claims filed after that date, and adjudicated under Part C of the Act, are considered by the Department of Labor (30 U.S.C. 902(c)) and individual coal mine operators bear primary responsibility for paying benefits (30 U.S.C. 932(b)).[3]

a. *HEW's regulations.* From its 1969 enactment until its 1978 amendment, the Black Lung Benefits Act provided that "the term 'total disability' has the meaning given it by regulations of the Secretary of Health, Education, and Welfare." See 30 U.S.C. (1976 ed.) 902(f). After HEW defined "total disability" as the inability to engage in any substantial gainful activity (see 20 C.F.R. 410.402(b) (1971)), Congress in 1972 provided that a miner should be considered totally disabled whenever he is unable to perform work comparable to his usual coal mine work. 30 U.S.C. 902(f)(1)(A). Congress at that time also liberalized the coverage of the program in several other respects.[4] HEW thereafter promulgated an amended set of regulations, known as its "permanent" regulations, which

[3] In certain cases, the Black Lung Disability Trust Fund, which the coal mining industry finances through an excise tax on coal and the Director of the Office of Workers' Compensation Programs administers, pays Part C benefits. See 30 U.S.C. 932(j), 934; 26 U.S.C. 4121(a), 9501.

[4] Among other changes, Congress directed that benefits should not be denied solely on the basis of a negative X-ray. 30 U.S.C. 923(b). It further provided that a miner should be presumed to be entitled to benefits, despite an X-ray that was negative for complicated pneumoconiosis, if he had worked in coal mines for 15 years and other medical evidence demonstrated that the miner had a totally disabling pulmonary impairment. 30 U.S.C. 921(c)(4). Congress repealed that presumption in 1981. Pub. L. 97-119, § 202(b)(1), 95 Stat. 1643.

governed the Part C program as well as the Part B program. Under those regulations, ventilatory and blood-gas studies and evidence of certain heart abnormalities could justify a finding of total disability. 20 C.F.R. 410.424, 410.426(b) & Subpt. D App.[5] In addition to proving that they were totally disabled, claimants also had to establish that they had pneumoconiosis and that their disability arose out of their coal mine employment.

In 1972, at the same time that it promulgated its permanent regulations, HEW promulgated an "interim" regulation applicable only to Part B claims. 20 C.F.R. 410.490(b). The interim regulation was HEW's response to congressional concern about an existing backlog of claims and the unavailability of medical testing facilities to evaluate claimants. *Mullins Coal Co.,* slip op. 16-17; 20 C.F.R. 410.490(a). It provided a rebuttable presumption that a claimant was totally disabled due to pneumoconiosis where he (a) presented X-ray, biopsy, or autopsy evidence establishing the existence of pneumoconiosis (20 C.F.R. 410.490(b)(1)(i)) or, in the case of one employed as a miner for at least ten years,[6] presented ventilatory study scores showing impairment (20 C.F.R. 410.490(b)(1)(ii)),

[5] Ventilatory studies, which measure the ability of the lungs to move air in and out, may establish the presence of a respiratory or pulmonary disease that may or may not be pneumoconiosis. Blood-gas studies demonstrate the presence of an impairment in the transfer of oxygen from the lungs to the blood. See *Mullins Coal Co.*, slip op. 5; Lapp, *A Lawyer's Medical Guide to Black Lung Litigation,* 83 W. Va. L. Rev. 721, 737-743 (1981).

[6] HEW's interim regulation is somewhat unclear as to how long a claimant had to work in coal mines to establish the interim presumption by means of ventilatory studies. In one part it requires 15 years of coal mine employment (20 C.F.R. 410.490(b)(1)(ii)), but later apparently requires only ten years of coal mine employment (20 C.F.R. 410.490(b)(3)).

and (b) demonstrated that the impairment arose out of coal mine employment (20 C.F.R. 410.490(b)(2)). The ventilatory study scores in the interim regulation required claimants to show a much less severe degree of impairment than was required under HEW's permanent regulations. Compare 20 C.F.R. 410.490(b)(1)(ii) with 410.426(b). With respect to causation, while claimants presenting ventilatory study scores, but not X-ray evidence, could establish the presumption only if they had worked in coal mines for ten years, it was presumed that their pneumoconiosis arose out of coal mining (20 C.F.R. 410.490(b)(3)). Claimants presenting X-ray, biopsy, or autopsy evidence of pneumoconiosis would be presumed to have shown causation if they had worked in coal mines for ten years. 20 C.F.R. 410.416, 410.456, 410.490(b)(2). Claimants presenting X-ray, biopsy, or autopsy evidence who had not worked in coal mines for ten years could also establish the presumption by proving causation in other ways (*ibid.*).[7]

The interim regulation specifically provided that, if the presumption was invoked, it could be rebutted by evidence that the miner was doing work comparable to his or her usual coal mine work or was able to do so. 20 C.F.R. 410.490(c). If a miner failed to invoke the presumption, he

[7] While the regulation did not specifically address how a miner with fewer then ten years of work in coal mines could prove that his pneumoconiosis arose from coal mine employment, a claimant could establish causation by showing that exposure to lung irritants other than coal mine dust was not the likely cause of his pneumoconiosis. HEW required claimants with five to nine years of coal mine employment to show that they had fewer than ten years of work in another job involving exposure to dust hazards. Claimants with fewer than five years of coal mine employment had to show that the disease arose within five years of that employment. See *Report of the Comptroller General of the United States, Examination of Allegations Concerning Administration of the Black Lung Benefits Program* 3 (1976).

nevertheless could establish that he qualified for benefits under HEW's permanent regulations. 20 C.F.R. 410.490(e).[8]

b. *Labor's regulations.* Prior to 1978, the Department of Labor, in adjudicating Part C claims, applied HEW's permanent regulations (see 20 C.F.R. 718.2 (1976)), but not its interim presumption, which by its terms applied only to Part B claims (20 C.F.R. 410.490(b)). By amendments enacted in 1978, Congress gave the Secretary of Labor authority to issue regulations defining "total disability" under the Part C program by directing the Secretary to "establish criteria for all appropriate medical tests * * * which accurately reflect total disability in coal miners." Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 95; 30 U.S.C. 902(f)(1)(D). In addition, Congress instructed the Secretary to reopen claims that had been denied before the effective date of the 1978 amendments. 30 U.S.C. 945. It provided in Section 402(f)(2), 30 U.S.C. 902(f)(2), that, in adjudicating the reopened claims and claims filed before the promulgation of final Labor Department regulations, the "[c]riteria applied by the Secretary of Labor * * * shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." Thus, Labor was to apply "criteria" no more restrictive than those applied by HEW, including the criteria in its interim regulation, to claims filed before it promulgated final regulations, which were promulgated on April 1, 1980.

[8] For example, a claimant who worked fewer than ten years in coal mines and did not have X-ray evidence of lung damage, but did have a ventilatory study score showing a significant pulmonary disability, would not qualify under HEW's interim presumption, but might qualify under HEW's permanent regulations. See 20 C.F.R. 410.414, 410.426(b).

The Secretary of Labor promulgated interim regulations in 1978 to govern the claims Congress ordered reopened and those filed before final regulations were promulgated. The regulations included an "interim presumption" of total disability from pneumoconiosis arising from coal mine employment—and thus of entitlement to benefits—applicable in circumstances that are similar, but not identical, to those set out in HEW's interim regulation. 20 C.F.R. 727.203. It provides, like HEW's interim regulation, that claimants may utilize X-ray, biopsy, or autopsy evidence or ventilatory studies satisfying medical criteria identical to those in HEW's interim regulation to establish the presumption. 20 C.F.R. 727.203(a)(1) and (2). It goes beyond HEW's regulation in allowing the presumption to be triggered by blood-gas studies, by other medical evidence including a physician's opinion, and, in the case of a deceased miner and in the absence of relevant medical evidence, by the affidavit of a survivor. 20 C.F.R. 727.203(a)(3)-(5). At the same time, however, the presumption of entitlement could be established under Labor's interim regulation only by claimants who worked in coal mines for at least ten years. 20 C.F.R. 727.203(a)(1). Thus, claimants who worked in coal mines for fewer than ten years and presented X-ray evidence showing pneumoconiosis could not, as under HEW's interim regulation, gain the benefit of the presumption of entitlement by relying on other evidence to show causation. In that event, they could not trigger the presumption at all.[9]

[9] Miners with fewer than ten years' experience in coal mines could, however, qualify for benefits by proving, apart from any presumption, that they were totally disabled as a result of pneumoconiosis arising out of coal mine employment. The Benefits Review Board does not apply the rules HEW applied in cases involving miners with fewer than ten years' experience (see note 7, *supra*), but instead has held that competent medical advice is sufficient to prove causation regardless of how many years a claimant worked in coal mines in cases where multiple causes are possible. See *Collura* v. *Director, Office of Workers' Compensation Programs,* 6 B.L.R. 1-100, 1-103 (1983), aff'd in part, petition dismissed without published opinion, 738 F.2d 421 (3d Cir. 1984). It is also the position of the Director of the Office of Workers' Compensation Programs that lay testimony is sufficient to prove causation from coal mine employment in cases where the evidence does not suggest other causes of the disease.

Like HEW's interim regulation, Labor's interim regulation provided that the presumption could be rebutted by proof that a claimant was doing or was capable of doing his usual coal mine work or work comparable to it. 20 C.F.R. 727.203(b)(1) and (2). Labor's interim regulation also provided that the presumption could be rebutted by proof that a claimant's disability did not arise in whole or in part out of coal mine employment or that the miner did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).[10] Labor's interim regulation also provided that anyone failing to qualify for the presumption of eligibility could seek to establish eligibility under Labor's final regulations (20 C.F.R. 727.203(d)), which are set forth at 20 C.F.R. Pt. 718. Claims filed after April 1, 1980, are adjudicated under those final regulations, which do not contain a presumption of entitlement comparable to HEW's interim presumption or Labor's interim presumption.

2. *The merits issue.* Charlie Broyles and Bill Colley

[10] Labor construed its interim presumption to shift the burden of persuasion, not merely the burden of production. *Mullins Coal Co.,* slip op. 7 n.12. It is not clear whether HEW's interim regulation shifted the burden of persuasion. Other presumptions in the Black Lung Benefits Act have been construed as shifting only the burden of production. *Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 27 (1976); *Prokes* v. *Mathews,* 559 F.2d 1057, 1060 (6th Cir. 1977); but see *Alabama By-Products Corp.* v. *Killingsworth,* 733 F.2d 1511, 1514-1515 (11th Cir. 1984).

filed claims for black lung benefits under the Part C program before Labor's final regulations took effect in 1980. Both submitted X-rays showing the presence of pneumoconiosis. Because neither had ten years of coal mine employment, neither could invoke the presumption of entitlement under Labor's interim regulation.

An administrative law judge determined that Broyles had worked for five years as a coal miner from 1946 to 1952, after which he worked over 20 years at other occupations involving exposure to dust (87-1095 Pet. App. 11a-12a). Although the administrative law judge found it unclear which occupation had caused Broyles' pneumoconiosis, he gave Broyles "the benefit of the doubt" and concluded that coal mining had caused it (*id.* at 16a). The administrative law judge also assumed that Broyles, who retired in 1976 following coronary bypass surgery (*id.* at 14a-15a), was totally disabled. However, relying on physicians' reports, the administrative law judge denied Broyles' claim because his disability was not due to pneumoconiosis, but instead was caused by his heart condition (*id.* at 16a). The Benefits Review Board affirmed (*id.* at 7a-9a).

The administrative law judge determined that Colley, who had arthritis, chronic bronchitis, and had suffered a stroke in 1978 (87-1095 Pet. App. 26a, 27a), had worked in coal mines for no more than nine and a half years between 1945 and 1962 (*id.* at 24a-25a). The administrative law judge found it "questionable" whether the X-ray Colley had submitted showed that he had pneumoconiosis (*id.* at 25a), but denied the claim on the basis of physicians' reports supporting the conclusion that Colley's pulmonary condition was not causally related to his prior coal mine employment (*id.* at 28a). The Benefits Review Board affirmed (*id.* at 18a-21a).

The Fourth Circuit consolidated the two cases.[11] It re-

[11] Lisa Kay Colley was substituted as claimant for her father, who died prior to the court of appeals' decision.

versed on the ground that in each case the administrative law judge "erred in failing to evaluate the claims under [HEW's interim regulation], 20 C.F.R. § 410.490" (87-1095 Pet. App. 2a). Relying on *Halon* v. *Director, Office of Workers' Compensation Programs,* 713 F.2d 21 (3d Cir. 1983), and *Coughlan* v. *Director, Office of Workers' Compensation Programs,* 757 F.2d 966 (8th Cir. 1985), the court concluded that Labor's interim presumption regulation is contrary to Section 402(f)(2)'s directive that the Secretary apply "criteria" that are not more restrictive than the criteria applied by HEW in its interim regulation (87-1095 Pet. App. 5a).[12] The court found Labor's interim regulation inconsistent with the statute because, under HEW's interim regulation but not under Labor's interim regulation, claimants such as Broyles and Colley, who submitted X-rays showing pneumoconiosis, could invoke the presumption of entitlement to benefits even if they had worked in coal mines for fewer than ten years. It rejected the Secretary's argument that Congress intended in Section 402(f)(2) that the Department of Labor should apply *medical* criteria no more restrictive than those applied by HEW to claims filed before Labor's permanent regulations were in place, but that Congress did not intend to require Labor to apply the same evidentiary standards and adjudicatory rules applied by HEW (87-1095 Pet. App. 5a).[13] The court remanded for reevaluation of Broyles' and Colley's claims (*id.* at 6a).

[12] In a divided opinion in *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139 (1987), petition for cert. pending, No. 87-1045, the Sixth Circuit also followed *Halon* and *Coughlan.*

[13] In so concluding, the Fourth Circuit did not refer to the decision of the Seventh Circuit in *Strike* v. *Director, Office of Workers' Compensation Programs,* 817 F.2d 395, 400 (1987), which expressly rejected the holdings in *Halon* and *Coughlan.* The Seventh Circuit

3. *The procedural issue.* The Eighth Circuit's decision in *Sebben* involves a mandamus action by four named plaintiffs on behalf of a putative class of unsuccessful claimants. The putative class members, like Broyles and Colley, had submitted X-rays showing the presence of pneumoconiosis but were denied the presumption of entitlement to benefits under Labor's interim regulation because they had not worked in coal mines for ten years (87-827 Pet. App. 18a).[14] The claims of some of the members of the putative class were denied before the 1978 amendments were enacted, reopened in light of the 1978 amendments, and again denied. Others filed claims after the 1978 amendments took effect but before the Secretary's final regulations were promulgated in 1980. The putative class members either failed to exhaust their administrative remedies or failed to seek judicial review of the final administrative denial of benefits. The plaintiffs sought to compel the Secretary of Labor to reopen the claims of the class members and reconsider them under the standard set forth in *Coughlan*. The district court denied the application for a writ of mandamus without certifying a class (87-827 Pet. App. 19a-22a).

The Eighth Circuit reversed (87-827 Pet. App. 1a-18a). It acknowledged that mandamus is warranted only where

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found "criteria," as used in Section 402(f)(2), ambiguous, noting that the final sentence of the immediately preceding subsection specifically refers to " 'criteria for all appropriate medical tests * * * which accurately reflect total disability in coal miners' " (817 F.2d at 401 (citation omitted)). Given the ambiguity, the court examined the legislative history of the provision and concluded that the Department's interpretation is consistent with the intent of Congress (*id.* at 402-404). Judge Weis, dissenting in *Halon*, had reached the same conclusion.

[14] The class is limited to those who submitted X-ray evidence, and does not include those seeking to trigger the presumption by relying on autopsy or biopsy evidence. 87-827 Pet. App. 18a.

there has been a " 'patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review' " and the agency had "a clear nondiscretionary duty to act" (*id.* at 4a (quoting *Nader* v. *Volpe,* 466 F.2d 261, 265-266 (D.C. Cir. 1972)). With respect to members of the putative class whose claims had been reopened and denied after the 1978 amendments, the court held that the Secretary has a duty to reopen them again because "[e]ven if review of those claims did occur, the Secretary did not do so under the proper standard" (87-827 Pet. App. 12a). As to claimants whose claims were first denied after the 1978 amendments, the court held that the Secretary "owes the same duty to these claimants to reopen and consider their claims" (*id.* at 12a-13a).

The Eighth Circuit rejected the argument that it should not order the claims reopened because the claimants had failed to exhaust their administrative remedies or seek review in a court of appeals in timely fashion. Without citation to any explicit legislative decision to relax the statutory deadlines, the court noted that "Congress had the authority to waive the limitation created by the deadlines" (87-827 Pet. App. 15a). With respect to those claims that had been reopened after the 1978 amendments and denied again, the court concluded that, in ordering reopening in 1978, "Congress, by implication, waived the thirty and sixty-day deadlines for appeals" (*id.* at 15a) and concluded that "[t]he Secretary has yet to take properly 'into account' the 1977 amendments" (*id.* at 16a). As to the later-filed claims, the court concluded that "[i]t would * * * be contrary to congressional intent to allow" those claims to be treated differently (*ibid.*). Furthermore, the court stated, the 30-day and 60-day deadlines "become largely unmeaningful for actions based on jurisdictional grants outside of" the Black Lung Benefits Act, such as the

mandamus statute (*id.* at 17a). It remanded the case for certification of a class whose claims the Secretary would have to reopen (*id.* at 2a n.1, 18a).

SUMMARY OF ARGUMENT

I. The Secretary of Labor reasonably concluded that Congress in Section 402(f)(2) mandated the application of medical criteria no more restrictive than those in HEW's interim regulation, but did not require the Department of Labor to apply other aspects of HEW's interim regulation. Section 402(f)(2)'s requirement that Labor apply no more restrictive "criteria" is set forth as part of the definition of "total disability," and while medical evidence is plainly relevant to that issue, a miner's years of service bear primarily on the question of causation. The structure of the statute therefore suggests that the term "criteria" as used in defining "total disability" means medical criteria only, and it was reasonable to conclude that miners with fewer than ten years of coal mine experience could be denied the opportunity to invoke a presumption of entitlement to benefits.

The legislative history also supports this conclusion. It shows that the language of Section 402(f)(2) was proposed in response to testimony that the ventilatory study scores applied by Labor in adjudicating Part C claims required a greater degree of impairment than was required under Part B and that, as a result, the approval rate was much lower under the Part C program. The House reports make clear that it intended to require Labor to apply *medical* criteria no more restrictive than those applied by HEW. The Senate, apparently more impressed than the House by testimony that the discrepancy in approval rates between the Part B and Part C programs was due to the unwarranted laxness of the ventilatory study scores in

HEW's interim regulation, passed a bill giving the Secretary of Labor authority to promulgate new medical criteria. The Conference Committee incorporated both approaches. In Section 402(f)(1)(D), following the Senate approach, it provided that the Secretary of Labor was to "establish [new] criteria for all appropriate medical tests." In Section 402(f)(2), which immediately follows Section 402(f)(1)(D), it adopted the House approach pending promulgation of these new criteria by providing that Labor was to apply "criteria" no more restrictive than those in HEW's interim regulation to claims filed before the final regulations were promulgated. In light of this history of the enactment of the language of Section 402(f)(2), the Secretary reasonably construed the word "criteria" to be shorthand for the phrase "criteria for all appropriate medical tests" in the preceding sentence.

Moreover, it is especially unlikely that Congress intended to provide a presumption of entitlement to benefits to miners with fewer than ten years of coal mine experience since the evidence before Congress showed that miners with fewer than ten years of coal mine experience rarely contract black lung disease. The Conference Report stated that all regulatory presumptions were to include the statutory presumption that pneumoconiosis resulted from coal mine employment where a miner had worked ten years in coal mines, and that is what Labor's interim regulation provided. Furthermore, the House Committee approved Labor's interim regulation after reviewing it and noting that the interim presumption could be established only by miners with ten years' experience.

In light of the statutory language and its legislative history, the Secretary's construction of the term "criteria" in Section 402(f)(2) is more plausible than that adopted by the Fourth Circuit. The Secretary's construction is at least a permissible construction, so the Fourth Circuit erred by failing to defer to it.

II. Assuming that the Secretary's construction of Section 402(f)(2) is erroneous, the Eighth Circuit nevertheless erred in holding that a writ of mandamus should issue ordering the reopening of claims that had been finally denied. Mandamus is warranted only where the defendant owes the plaintiff a clear nondiscretionary duty. Mandamus is not warranted where the interpretation of a statute is a prerequisite to the establishment of the duty that is said to be owed, because, in such a case, no *clear* duty is owed, and Section 402(f)(2) does not plainly require the construction respondents favor. In any event, the Secretary has no duty to reopen the claims of the members of the putative class. The 1978 amendments required the reopening of certain claims, but those claims were reopened; the amendments did not require any further reopening.

Mandamus is also unavailable because members of the putative class failed to appeal adverse decisions, and exhaustion of statutory remedies is a prerequisite to mandamus relief. Application of that rule is particularly sensible here because, if members of the putative class had raised their challenge to Section 402(f)(2) and pursued it administratively, cases where the construction of the statute might have made a difference would have been identified. In addition, the Eighth Circuit's reopening order flouts the statutory appeal deadlines.

The fact that members of the putative class failed to challenge the denials of their claims in timely fashion also leads to the conclusion that their claims are barred by res judicata. Where, as here, the administrative proceeding has the essential characteristics of a judicial proceeding and the plaintiffs could have advanced a legal argument in the administrative proceeding, they should be barred from raising the claim in a subsequent proceeding. Any other rule fails to establish repose and leads to costly repetitive litigation, as this case illustrates.

ARGUMENT

I. THE DEPARTMENT OF LABOR REASONABLY CONSTRUED SECTION 402(f)(2) TO REQUIRE THAT THE MEDICAL CRITERIA APPLIED IN ADJUDICATING PART C CLAIMS NOT BE MORE RESTRICTIVE THAN THE MEDICAL CRITERIA APPLIED IN ADJUDICATING PART B CLAIMS

A. *The Structure and Context Of The Statute Support The Secretary's Construction*

Although Section 402(f)(2) requires the Secretary of Labor to apply "criteria" no more restrictive than those applied by HEW to claims filed before the final regulations were promulgated, Congress did not define the term "criteria," and the proper definition cannot be discerned from the word alone.[15] The Secretary's construction—that Congress intended Labor to apply medical criteria no more restrictive than those in HEW's interim regulation to

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[15] "Criteria" is defined as "a standard on which a judgment or decision may be based" (*Webster's New Collegiate Dictionary* 307 (1983)) and its meaning varies according to what is to be judged or decided. The Sixth Circuit in *Kyle*, which held that Labor's interpretation is contrary to the statute, nevertheless conceded that "[m]anifestly, the term 'criteria' is subject to numerous possible interpretations" (819 F.2d at 142). Similarly, in *Strike*, the Seventh Circuit, which upheld the Secretary of Labor's interim regulation, stated that the "meaning of the statute is ambiguous" (817 F.2d at 401).

Representative Simon stated with respect to Section 402(f)(2) that "the language in this bill is crystal clear." 124 Cong. Rec. 3431 (1978). While Representative Simon's conclusion that the language enacted is clear beyond dispute has surely not received uniform acceptance, it is noteworthy that he thought it clear that under Section 402(f)(2) "[t]he Department of Labor is required to apply *medical* criteria no more restrictive than criteria" applied under HEW's interim regulation (*ibid.* (emphasis added)).

such claims, but did not require Labor to allow claimants with fewer than ten years' coal mine experience to establish a presumption of entitlement to benefits—is strongly supported by the structure and context of the statute.

The "no more restrictive criteria" requirement appears in Section 402(f), which is the provision of the Black Lung Benefits Act that defines "total disability." Medical evidence, like vocational evidence, is relevant to the question whether a miner is totally disabled, since the Act defines total disability as the inability to perform coal mine work or work requiring comparable abilities (Section 402(f)(1)(A)). But evidence as to how long a claimant worked in coal mines has only the most indirect bearing on the issue of total disability, as distinct from whether a claimant's pneumoconiosis arose from coal mine employment. Congress, in amending the definition of "total disability" to require the application of criteria no more restrictive than those employed under HEW's interim regulation, cannot without justification be assumed to have referred to criteria whose main relevance is to the separate issue of causation. If Congress had intended to require Labor to apply HEW's interim regulation in its entirety, it presumably would have amended the statutory presumption provision, 30 U.S.C. 921(c)(4), to mandate the use of that provision. The fact that it instead modified the definition of "total disability" supports the conclusion that it was referring to medical criteria by which that disability is to be judged, and not to adjudicatory and evidentiary rules bearing on how the pneumoconiosis came about.

B. ***The Legislative History Of Section 402(f)(2) Supports The Conclusion That "Criteria" Means Medical Criteria And Not Evidentiary And Adjudicatory Rules***

1. Congress's purpose in amending Section 402(f) in 1978 further supports the Secretary's conclusion that Congress meant "criteria" in Section 402(f)(2) to mean medical criteria and not to include adjudicatory and evidentiary rules.[16] The members of the House of Representatives who favored the 1978 amendment ultimately adopted as Section 402(f)(2) were particularly concerned that the ventilatory study scores applicable to Part C claims under HEW's permanent regulations (20 C.F.R. 410.426(b)) were much stricter than the scores applicable to Part B claims under HEW's interim regulation (20 C.F.R. 410.490(b)(1)(ii)). The amendment had its genesis in 1974, after the 1972 amendments had taken effect, when the House held hearings and a representative of the United Mine Workers complained that the approval rate for claims filed under the Part C program was much lower than the approval rate for claims filed under the Part B program. *Black Lung Amendments of 1973: Hearings on H.R. 3476 Before the General Subcomm. on Labor of the House Comm. on Education and Labor,* 93d Cong., 1st Sess. 351 [hereinafter *1974 Hearings*] (statement of Bedford W. Bird). The Mine Workers' representative ex-

[16] This Court, in footnote 31 of the *Mullins Coal Co.* opinion (slip op. 22), appeared to assume that the adjudicatory and evidentiary rules in Labor's interim regulation could be no more restrictive than those in HEW's interim regulation. Neither that assumption, which was not necessary to the decision there, nor the Court's statement that Labor's interim regulation "satisfies Congress' demand that Labor's criteria 'shall not be more restrictive than the criteria applicable' " under HEW's interim presumption (slip op. 18), should be viewed as controlling this case, where the issue is actually presented.

plained that the low approval rate under the Part C program was the result of the fact that the "ventilatory test scores [in HEW's permanent regulations] are only minimally different from the scores used to evaluate permanent disability under the Social Security disability program" (*id.* at 353). He recommended that Congress enact "an explicit provision extending the so-called 'interim' *medical* criteria" (*ibid.* (emphasis added)). The Director of the Appalachian Research and Defense Fund, a legal services group that represents miners, agreed that "[t]he ventilatory study standards are what makes [*sic*] the difference" (*id.* at 398 (statement of John Rosenberg)). The Department of Labor's representative, who was criticized by some members of the committee because the medical standards applied in determining whether a miner was disabled were stricter under Part C than Part B (see *1974 Hearings* 329 (statement of Chairman Perkins) and 399 (statement of Rep. Dent)), noted that "we are only talking about one standard[,] the ventilatory [standard]." *Id.* at 398 (statement of Nancy Synder).

The House responded with bills amending the definition of total disability to require HEW to adjudicate Part C claims under standards no more restrictive than those applied to Part B claims. See H.R. 3333, 94th Cong., 1st. Sess. § 3 (1975); H.R. 2913, 94th Cong., 1st Sess. § 3 (1975); H.R. 10760, 94th Cong. 1st Sess. § 7(a) (1975). The committee report to one of those bills explained that such a requirement was necessary because "the Department of Health, Education, and Welfare, exercising authority provided under the current law, has literally saddled the Department of Labor with rigid and difficult *medical* standards for measuring claimant eligibility under part C of the program. The so-called 'permanent' *medical* standards now in effect under part C are much more demanding than

the so-called 'interim' standards applied by HEW under part B of the program." H.R. Rep. 94-770, 94th Cong., 1st Sess. 13-14 (1975) (emphasis added). The report stated that the House bill "would require that standards no more restrictive than the 'interim' *medical* standards shall be equally applicable to part C claims" (*id.* at 15 (emphasis added)). These explanatory comments are identical to the comments that accompanied the version of the bill initially passed by the House. See H.R. Rep. 95-151, 95th Cong. 1st Sess. 14 (1977).[17]

Like the House, the Senate focused on the fact that HEW's interim ventilatory study scores "are far less stringent" than the scores in its permanent regulation. S. Rep. 95-209, 95th Cong., 1st Sess. 13 (1977). However, it ultimately determined not to require continued application of HEW's interim medical criteria. The Senate Report noted HEW's assertions "that the interim standards do not accurately determine actual disability, that they were used under part B only to clear away the backlog of claims arising from the 1972 amendments, and that the permanent standards more accurately identify disabling respiratory and pulmonary functions in coal miners" (*ibid.*). The report also noted that the United Mine Workers considered even HEW's interim ventilatory study scores too stringent (*ibid.*). The Senate concluded that it was "not qualified to assess the appropriateness of medical test standards to be used to determine disability in coal miners" (*ibid.*) and the bill it passed gave the Secretary of Labor authority to define the term "total disability" without reference to previously applied criteria (*id.* at 34-35).

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[17] That version of the bill would have amended Section 402(f) simply by providing that "[w]ith respect to a claim filed after June 30, 1973, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973" (H.R. Rep. 95-151, *supra*, at 52).

The Conference Committee reconciled the differing approaches of the House and Senate bills by adopting the Senate approach on a permanent basis and the House approach pending promulgation of Labor's regulations. H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978). Congress resolved the controversy over whether the ventilatory study scores used to adjudicate Part C claims were too strict or those used to adjudicate Part B claims were too lax by directing the Secretary of Labor in Section 402(f)(1)(D) to consult with the Director of the National Institute for Occupational Safety and Health and "establish *criteria for all appropriate medical tests* * * * which accurately reflect total disability in coal miners" (emphasis added)). The statute's next section, Section 402(f)(2), directed the Secretary of Labor to use the "criteria" in HEW's interim regulation in adjudicating claims filed before Labor's final regulations took effect. In light of that placement and the history of the amendment, the Secretary of Labor reasonably concluded that "criteria" in Section 402(f)(2) is shorthand for the phrase used in the preceding sentence, "criteria for all appropriate medical tests." See *Strike* v. *Director, Office of Workers' Compensation Programs,* 817 F.2d 395, 401 (7th Cir.1987).[18]

[18] The Sixth Circuit suggested in *Kyle* that Congress's choice of the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D) and only "criteria" in Section 402(f)(2) shows that it intended "criteria" in the latter section to have a broader meaning (819 F.2d at 143). However, nothing in the legislative history supports such a conclusion. To the contrary, the fact that the House, which drafted the language that became Section 402(f)(2), focused on the difference between the ventilatory study scores used under Part B and Part C during the 1974 Hearings and repeatedly referred to *medical* criteria in its reports (H.R. Rep. 94-770, 94th Cong., 1st Sess. 13-14 (1975); H.R. Rep. 95-151, 95th Cong., 1st Sess. 15 (1977)) indicates that the criteria referred to in Section 402(f)(2) are medical criteria.

2. Congress therefore gave substantial attention to the problem of the medical standards to be used in determining whether a claimant was totally disabled. There is, on the other hand, no evidence in the language of the statute or its legislative history indicating that Congress intended to require the use of the adjudicatory and evidentiary rules of HEW's interim regulation until Labor's final regulations were promulgated. In particular, there is no evidence that Congress intended to preserve the ability of miners with fewer than ten years' experience to establish the presumption of entitlement to black lung benefits contained in HEW's interim regulation. To the contrary, as the Seventh Circuit noted in *Strike* (817 F.2d at 403-404 (emphasis added)): "The only reference to the use of presumptions in the conference report stated that '[t]he conferees also intend that *all* standards are to incorporate the presumptions contained in section 411(c) of the Act [30 U.S.C. § 921(c)].' H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 * * *. That Section creates a rebuttable presumption that pneumoconiosis arose out of coal mine employment '[i]f a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines.' 30 U.S.C. § 921(c)(1)." It is precisely that requirement of ten years' coal mining experience that was "expressly incorporate[d]" (817 F.2d at 404) into the Secretary of Labor's interim regulation.

Moreover, the summary of medical knowledge on coal worker's pneumoconiosis appended to the final House report concluded that there was broad agreement that "[t]he probability that coal miners will develop black lung increases regularly after about ten years of working underground." H.R. Rep. 95-151, *supra*, at 30. It added that the

study "with the most carefully selected samples of miners" showed that " '[t]here was little pneumoconiosis until miners had worked at least eleven years in the mines' " (*ibid.* (citation omitted)). In view of that recognition by the House, it would be surprising if Congress simultaneously acted to mandate the use of a presumption of entitlement to black lung benefits for miners with fewer than ten years' experience.[19]

Furthermore, post-enactment legislative history demonstrates that the Congress that adopted Section 402(f)(2) was not concerned with the adjudicatory and evidentiary rules used by HEW. Shortly after the 1978 amendments were enacted, the members of the House Committee reviewed and commented on Labor's interim regulation before it was adopted in final form. See *Strike*, 817 F.2d at 404; *Halon*, 713 F.2d at 30 (Weis, J., dissenting). The committee stated that it "strongly supports the

[19] The Sixth Circuit in *Kyle*, like most of the other courts that have held that Labor's interim regulation is inconsistent with Section 402(f)(2), relied on the assertion that the "general purpose" of the 1978 amendments "appears to have been to liberalize the standards under which black lung benefits were being awarded at the time" (819 F.2d at 142). That statement is not entirely accurate and certainly does not compel the conclusion that Congress intended to provide a presumption of entitlement to benefits to miners with fewer than ten years of coal mine experience. Congress heard evidence both that HEW's permanent ventilatory study standards were too strict and that HEW's interim ventilatory study standards were too lax. It ultimately responded by instructing Labor to devise new medical standards, which is not a liberalizing of the standards. In the interim, it instructed Labor to apply HEW's interim ventilatory study standards, which did have a liberalizing effect. But that does not indicate that Congress intended to mandate that miners with fewer than ten years' experience be allowed to establish a presumption of entitlement to benefits, and it is improbable that it so intended in light of the evidence before it that those miners were unlikely to suffer from black lung disease.

re-promulgation of the interim standards, as found in Section 727.203(a)" (87-821 Pet. App. 44a). It expressly recognized that ten years of coal mine employment was required to invoke the presumption in that section (*id.* at 46a) and never hinted that that requirement violated the statute. These comments are entitled to considerable weight since they reflect the contemporaneous view of the authors of the legislation. *North Haven Board of Education* v. *Bell,* 456 U.S. 512, 526-527, 533-534 (1982); *Talley* v. *Mathews,* 550 F.2d 911, 920 (4th Cir. 1977)). They further confirm the correctness of Labor's interpretation. See *Consolidated Rail Corp.* v. *Darrone,* 465 U.S. 624, 634 (1984).

Finally, it has been contended that Labor's interim regulation is also invalid in that it authorizes rebuttal by two methods not explicitly set forth in HEW's interim regulation, which explicitly allows rebuttal only on the ground that the claimant is doing or is capable of doing his usual coal mine work. 20 C.F.R. 410.490(c). See page 9, *supra.* This issue is pending in the Sixth Circuit in *Youghiogheny & Ohio Coal Co.* v. *Miliken,* No. 88-3213, and *Grant* v. *Director, Office of Workers' Compensation Programs,* No. 87-3674; see also *Sulyma* v. *Director, Office of Workers' Compensation Programs,* 827 F.2d 922, 924 (3d Cir. 1987).[20] If HEW's interim regulation really confines rebuttal evidence to that which it specifically authorizes, and if Section 402(f)(2) requires Labor to apply the adjudicatory and evidentiary rules embodied in HEW's interim regulation, Labor's inclusion of additional rebuttal methods does, indeed, make its regulation "more restrictive" than HEW's and thus is contrary to the

[20] The issue was raised but not decided in *Consolidation Coal Co. v. Smith,* 837 F.2d 321 (8th Cir. 1988).

statute.[21] We submit that Congress could not have intended such a result, and that this fact gives further support to the Secretary's interpretation of the statute.

Specifically, such an argument suggests that Labor's interim regulation is invalid insofar as 20 C.F.R. 727.203(b)(3) and (4) authorize rebuttal by showing that the claimant's disability did not arise out of coal mine employment or is not due to pneumoconiosis. However, Congress enacted the Black Lung Benefits Act to provide benefits to a coal miner "if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment" (*Mullins Coal Co.*, slip op. 5). To deny coal mine operators the ability to prove that a claimant does not have pneumoconiosis or that his disability did not arise out of coal mine employment would therefore appear to be irrational and perhaps even suspect on due process grounds. Cf. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 34-37 (1976) (construing Section 411(c)(4) not to limit the evidence a coal mine operator may present on

[21] The Department of Labor does not think that the rebuttal methods set out in HEW's interim regulation were meant to be exhaustive. See 43 Fed. Reg. 36826 (1978). The Benefits Review Board, however, thinks that HEW's interim regulation did not allow for rebuttal by proof that the claimant did not have pneumoconiosis or the claimant's disability did not arise out of coal mine employment. *Whiteman* v. *Boyle Land & Fuel Coal Co.*, No. 87-348 BLA (May 2, 1988), slip op. 3. At the same time, though, the Board believes that HEW's interim regulation cannot be applied to Part C claims because coal mine operators were not given the opportunity to comment on it as required by the Administrative Procedure Act and that the additional rebuttal methods in Labor's regulation should be applied (*id.* at 3-4).

rebuttal, thus avoiding a constitutional challenge); *Mullins Coal Co.*, slip op. 22 n. 32. It would also appear to be contrary to the statutory command that "all relevant evidence shall be considered." 30 U.S.C. 923(b); *Mullins Coal Co.*, slip op. 13. To avoid these problems, it is sensible to construe the reference to "criteria" in Section 402(f)(2) as encompassing medical standards, but not adjudicatory or evidentiary rules.[22]

C. *The Secretary's Interpretation Of Section 402(f)(2) Is Entitled To Deference*

The Department of Labor's construction of "criteria" in Section 402(f)(2) as referring to medical criteria, but excluding evidentiary and adjudicatory rules is more consistent with the language of the statute and its legislative history than the alternative interpretation the Fourth Circuit adopted. In addition, Labor's interpretation in its 1978 regulation of a term added in the 1978 amendments represents "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (citation omitted); see also *Morrison-Knudsen Contruction Co.* v. *Director, Office of*

[22] The Sixth Circuit, while holding in *Kyle* that Labor's interim regulation is contrary to Section 402(f)(2) because it does not allow claimants with fewer than ten years of coal mine work to invoke the presumption of total disability, suggested that Labor's interim regulation is not inconsistent with the statute insofar as it authorizes additional rebuttal methods. 819 F.2d at 144; see also *Warman* v. *Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 258 n.1 (6th Cir. 1988); *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363, 1366 n.2 (6th Cir. 1987); *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 490 (6th Cir. 1985). The court did not explain why it was permissible for Labor's interim regulation to be more restrictive in authorizing additional rebuttal methods.

Workers' Compensation Programs, 461 U.S. 624, 635 (1983). And where " 'the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' " *NLRB* v. *United Food Workers Union, Local 23,* No. 86-594 (Dec. 14, 1987), slip op. 10 (quoting *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). Since Labor's contemporaneous construction of Section 402(f)(2) is reasonable, that construction is entitled to deference.

II. THE EIGHTH CIRCUIT ERRED IN ORDERING THE REOPENING OF FINAL, DENIED CLAIMS

If this Court holds that the Secretary of Labor permissibly construed Section 402(f)(2), then the Eighth Circuit plainly erred by ordering the reopening of the putative class members' claims. However, as explained below, assuming arguendo that Labor erroneously interpreted Section 402(f)(2), the Eighth Circuit nevertheless erred in ordering the reopening of thousands of claims that had been finally denied. And that error, if uncorrected, will have serious consequences on the system by which black lung claims are presently resolved. As explained in our petition for a writ of certiorari (87-827 Pet. 10-12), approximately 94,000 claims, most of which were finally denied more than six years ago, will have to be reopened if the Eighth Circuit's decision is affirmed and a nationwide class is certified. Since administrative law judges currently issue about 10,000 decisions each year in black lung cases, such a massive reopening effort would very likely create a significant backlog in a system that is already severely backlogged. See *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the*

House Comm. on Government Operations, 99th Cong., 1st Sess. (1985) [hereinafter *1985 Hearing*]; *Report to the Honorable Donald J. Pease, House of Representatives, by the General Accounting Office, Adjudication of Black Lung Claims by Labor's Office of Administrative Law Judges and Benefits Review Board* (1984) (*reprinted in* the *1985 Hearing* 37).

A. *Mandamus Relief Is Unavailable Because Members Of The Putative Class Were Owed No Clear Nondiscretionary Duty And Failed To Exhaust Their Statutory Remedies*

1. "This Court repeatedly has observed that mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, No. 86-1329 (Mar. 22, 1988), slip op. 17-18, citing *Kerr* v. *United States District Court*, 426 U.S. 394, 402 (1976). As codified at 28 U.S.C. 1361,[23] mandamus is warranted "only if the defendant owes [the plaintiff] a clear nondiscretionary duty." *Heckler* v. *Ringer,* 466 U.S. 602, 616 (1984). See also *Gulfstream Aerospace*, slip op. 18; *Kerr*, 426 U.S. at 403. The Secretary of Labor did not breach any clear nondiscretionary duty owed to members of the putative class.

The Department of Labor followed the directive of Section 402(f)(2) and considered (in some cases, reconsidered), under its interim regulation, claims filed before the final regulations were promulgated. The Eighth Circuit found a breach of a clear duty because it concluded that the interim regulation conflicted with the statute. But, even assuming that the interim regulation is inconsistent

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[23] Section 1361 provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

with Section 402(f)(2), mandamus is not warranted because where the existence of a duty "depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur* v. *United States ex rel. Kadrie,* 281 U.S. 206, 219 (1930). Otherwise stated, "the mandamus remedy is only available 'under *exceptional* circumstances of *clear illegality*. When the performance of official duty calls for a construction of governing law, the [federal] officer's interpretation will not be disturbed by a writ of mandamus unless it is *clearly wrong* and his official action is arbitrary and capricious.' " *Homewood Professional Care Center, Ltd.* v. *Heckler,* 764 F.2d 1242, 1251 (7th Cir. 1985) (emphasis in original) (quoting *Americana Healthcare Corp.* v. *Schweiker,* 688 F.2d 1072, 1084 (7th Cir. 1982), cert. denied, 459 U.S. 1202 (1983)). See also *Maczko* v. *Joyce,* 814 F.2d 308, 310 (6th Cir. 1987) ("when a duty is disputed or subject to various interpretations * * * the duty is not 'owed' in that the obligation to do a particular act cannot be said to be clear, peremptory, defined or ministerial"), cert. denied, No. 86-2020 (Oct. 5, 1987). In light of the conflict in the circuits on the merits issue (and the dissenting opinions in two of the cases where the courts held that the Secretary's interim regulation conflicts with the statute), it can hardly be argued that the Secretary's construction is so clearly wrong as to warrant mandamus.

Respondents attempt to avoid the "clear illegality" requirement by suggesting that it no longer applies when a court of appeals must construe a statute to decide whether a clear legal duty exists.[24] Under their theory, a court may

[24] The putative class respondents dismiss decisions such as this Court's decision in *Wilbur* as "old cases." 87-821 Br. in Opp. 21.

construe a statute the interpretation of which is in doubt and, if it concludes that the statute, as construed, creates a duty, then such a duty clearly exists. See, *e.g., Government of Virgin Islands* v. *Douglas,* 812 F.2d 822, 832 n.10 (3d Cir. 1987); *13th Regional Corp.* v. *United States Dep't of Interior,* 654 F.2d 758, 760 (D.C. Cir. 1980). We submit that mandamus cannot be so justified. Even if it could, however, such a theory would not be applicable here because nothing in the statute compels the Secretary to reopen their claims now. To support the action it took, the Eighth Circuit not only had to conclude (wrongly in our view) that the statute plainly means what respondents say it means, but also that the statute plainly requires the Secretary to reopen (and, in some cases, re-reopen) claims that had been finally denied. The statute directed the Secretary to reopen some claims, and they were reopened. Nothing in the statute requires the Secretary to reopen those claims again, or to reopen the other claims that were first denied under Labor's interim regulation, and the Secretary accordingly has no duty, much less a clear nondiscretionary duty, to do so.

2. In addition, mandamus "is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief." *Heckler* v. *Ringer,* 466 U.S. at 616. Mandamus is plainly unwarranted here because members of the putative class failed to exhaust the statutory remedies that were open to them and, if pursued, might have provided the relief they seek.

The Black Lung Benefits Act, which incorporates adjudicatory provisions of the Longshore and Harbor Workers' Compensation Act (see 30 U.S.C. (& Supp. III) 932(a)), provides a comprehensive review scheme that allows a claimant a full opportunity to contest the validity of regulations such as the interim presumption at issue here. Claims for benefits are presented to a deputy com-

missioner in the Department of Labor's Office of Workers' Compensation Programs, who is responsible for developing evidence, notifying responsible coal mine operators of potential liability, defining contested issues, and making an initial determination on eligibility. See 20 C.F.R. 725.351(a), 725.410-725.422. Any party who disagrees with the deputy commissioner's proposed resolution of the issues may obtain a hearing before an administrative law judge (ALJ) by requesting one within 30 days of the deputy's decision. 20 C.F.R. 725.419. After the ALJ rules, any party may seek review of that decision by the Benefits Review Board (20 C.F.R. 725.481), which "fulfill[s] the review function previously performed by district courts" (*Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1118 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985)), by filing a petition for review within 30 days of the ALJ's decision. 30 U.S.C. (& Supp. III) 932(a) (incorporating 33 U.S.C. 921(a)); 20 C.F.R. 725.479. The Board has asserted, with court approval, that it has authority to invalidate regulations that it finds inconsistent with the Black Lung Benefits Act. *Gibas*; *Carozza* v. *United States Steel Corp.*, 727 F.2d 74 (3d Cir. 1984); *McCluskey* v. *Zeigler Coal Co.*, 2 B.L.R. 1-1248 (Ben. Rev. Bd. 1981).[25]

[25] In fact, whether Labor's interim regulation complies with Section 402(f)(2) was first raised, sua sponte, by Board member Miller, in *Lynn* v. *Director, Office of Workers' Compensation Programs*, 3 B.L.R. 1-125, 1-128 (1981). The Board did not decide the issue in *Lynn* (*id.* at 1-126 n.1) or in *Halon* (see 713 F.2d at 31), the first court of appeals decision on the issue, because it had not been timely raised in either case. After *Halon*, the Board found the regulation consistent with the statute, but followed *Halon* in claims arising in the Third Circuit. See *Reilly* v. *Director, Office of Workers' Compensation Programs*, 7 B.L.R. 1-139, 1-144 (1984). Because the issue was unsettled before the Board until 1984, and because adminstrative law judges follow the Board where it disagrees with Labor Department regulations, respondents err in claiming (87-821 Br. in Opp. 16) that raising the issue would have forced members of the putative class, all of whom filed claims before April 1, 1980, through a "clearly futile pursuit of the entire administrative process and an appeal to a court of appeals."

Any party may petition the appropriate court of appeals for review of the Board's decison for legal error within 60 days. 30 U.S.C. (& Supp. III) 932(a) (incorporating 33 U.S.C. 921(c)); 20 C.F.R. 725.482.

The members of the putative class have in common a failure to timely pursue the remedies statutorily available to them to challenge the denial of their claims. Some failed to challenge adverse decisions by a deputy commissioner, others failed to seek review of an adverse ALJ decision, and others failed to appeal adverse Benefits Review Board decisions to the court of appeals. See 87-827 Pet. App. 4a-5a. There is no question that the relief they now seek could have been ordered, had they pursued their claims. The claimants in *Halon, Coughlan, Kyle,* and *Broyles* obtained that relief, and the putative class respondents have suggested no reason why they failed to pursue their claims. Accordingly, there is no reason why the requirement for mandamus relief that a plaintiff "exhaust[] all other avenues of relief" (*Heckler* v. *Ringer,* 466 U.S. at 616) should be waived.[26]

There are substantial practical reasons for requiring exhaustion of the statutory remedies. See generally *McKart*

[26] The putative class respondents state (87-821 Br. in Opp. 19) that "the Secretary had denied claimants a right that could not, in principle, be vindicated if those claimants were required to pursue the administrative process on an individual basis." That is flatly wrong. If they had appealed and prevailed on the argument that the Secretary's interim regulation is contrary to Section 402(f)(2), and they qualified for the presumption of entitlement under HEW's interim regulation, they would have obtained the benefit of that presumption, which is

v. *United States*, 395 U.S. 185, 193-195 (1969). If putative class members had challenged Labor's construction of Section 402(f)(2) in a timely manner, the agency could have addressed it in individual cases and at least identified those cases where the interpretation of Section 402(f)(2) made a difference in the outcome. As matters now stand, it is not possible to determine which claimants might have been adversely affected by Labor's construction. Moreover, the Eighth Circuit's decision eviscerates the deadlines established for appealing denials of black lung benefits claims, which have been held to be jurisdictional. See, *e.g.*, *Bolling* v. *Director, Office of Workers' Compensation Programs*, 823 F.2d 165 (6th Cir. 1987); *Butcher* v. *Big Mountain Coal, Inc.*, 802 F.2d 1506 (4th Cir. 1986); and cases cited at 87-827 Pet. App. 17a n.13. Indeed, the court of appeals acknowledged that, in its view, those deadlines were "largely unmeaningful" (*id.* at 17a).

B. ***Reconsideration Of The Claims Is Barred By Res Judicata***

In addition to being barred from seeking mandamus relief because they failed to pursue the avenue of relief available to them under the Black Lung Benefits Act, the

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what they now seek. The cases respondents cite in support of their claim that exhaustion should be excused, such as *Nader* v. *Volpe*, 466 F.2d 261, 269 (D.C. Cir. 1972) (district court may "preserve a substantial right from irretrievable subversion in an administrative proceeding"), are therefore not relevant to their claim. Moreover, as the Eighth Circuit noted (87-827 Pet. App. 4a), Labor has been applying adverse court of appeals decisions in cases pending in the relevant circuit on the date of the decision, so, after the first claimant in a circuit prevailed on the merits issue, no other claimant was required to continue to pursue it. And, in light of respondents' suggestion that it is unreasonable to expect claimants to retain counsel (87-821 Br. in Opp. 17), it should be noted that the Act requires responsible operators or the Black Lung Disability Trust Fund to pay prevailing claimants' attorneys' fees. See 20 C.F.R. 725.362, 725.367.

putative class members are barred from attempting to relitigate their claims now by res judicata, because they failed to challenge the denials of their claims within the time limits Congress established. It is well settled that a final judgment of a court on the merits of an action "precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981). Relitigation is barred even if the final, unappealed judgment was "wrong or rested on a legal principle subsequently overruled in another case" (*ibid.*). Similarly, under Section 83 of the Restatement (Second) of Judgments (1982), "a valid and final [administrative] adjudicative determination has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."

This Court has held that the unreviewed factfindings of state and federal administrative agencies are entitled to preclusive effect. *University of Tennessee* v. *Elliott*, No. 85-588 (July 7, 1986), slip op. 10; *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966). The Court has also stated more broadly that res judicata would bar the relitigation of a "claim" that was the subject of an administrative determination. *Commissioner* v. *Sunnen*, 333 U.S. 591, 598 (1948). Although this Court has not held that an unreviewed administrative judgment bars a party from litigating a legal issue that could have been raised but was not in the administrative action or on appeal (see 4 K. Davis, *Administrative Law Treatise* 49 (1983)), it has recognized the principle set forth in the Restatement of Judgments that the preclusive effect of an administrative decision is largely determined by whether the administrative forum has " 'the essential procedural characteristics of a court.' " *University of Tennessee*, slip op. 9 n.6 (quoting comments to Section 83 of the Restatement (Second) of Judgments).

The Restatement rule that parties are precluded from bringing actions raising legal issues that they could have raised in a prior administrative proceeding where the administrative proceeding had the essential characteristics of a judicial proceeding should be applied here. It is clear that black lung benefits claims are adjudicated in adversarial, court-like proceedings. Claimants (and operators) have the right to counsel (20 C.F.R. 725.362), may develop evidence and engage in discovery (20 C.F.R. 725.450-725.457), and receive written decisions with findings of fact and conclusions of law (20 C.F.R. 725.418(b), 725.477(b)). Review by the Benefits Review Board and then by a court of appeals is available after an ALJ decision. 30 U.S.C. (& Supp. III) 932(a) (incorporating 33 U.S.C. 921)). As noted (page 32, *supra*), the Board considers itself free to hold that Labor Department regulations conflict with the statute and, of course, a court of appeals has authority to reverse a benefit decision on the basis that the standards applied in the administrative proceeding were contrary to those required by the statute. If a party fails to seek timely review of a decision by a deputy commissioner, an administrative law judge, or the Benefits Review Board, the unreviewed decision becomes final.[27]

[27] Decisions are subject to modification only where there is "a change in conditions or a mistake in a determination of fact" and a request for modification is made within one year of the final decision. See 30 U.S.C. (& Supp. III) 932(a); 33 U.S.C. (& Supp. III) 922; 20 C.F.R. 725.310. This modification provision is not a basis for refusing to apply res judicata any more than the possibility of reopening district court judgments for various reasons under Fed. R. Civ. P. 60(b) is a reason for refusing to give judicial decisions preclusive effect. See *Downs* v. *Director, Office of Workers' Compensation Programs*, 803 F.2d 193, 199 n.13 (5th Cir. 1986) (res judicata applies despite modification possibilities).

Subsequent claims for black lung benefits may be entertained where "the deputy commissioner determines that there has been a material change in conditions." 20 C.F.R. 725.309(d). That exception is necessary because pneumoconiosis is a progressive disease, so that a claimant who is not totally disabled when he first applies for benefits may subsequently become totally disabled as a result of black lung disease even if he was not exposed to coal dust in the interim. See Lopatto, *supra*, 85 W. Va. L. Rev. at 680. That exception is plainly not a valid basis for denying preclusive effect to administrative decisions in situations where the predicate for reconsideration—a material change in conditions—is not satisfied.

[28] The Eighth Circuit suggested that Congress intended to waive the failure on the part of the members of the putative class to exhaust their administrative remedies or seek judicial review in timely fashion (87-827 Pet. App. 15a-17a). But, while Congress did in fact waive the deadlines in the case of claimants who had been denied benefits prior to the 1978 amendments by ordering that their claims be reopened, those claims were reopened and reconsidered. The court of appeals plainly erred in concluding that it could order further reopening. Nothing in the statute suggests that Congress intended to abolish the deadlines it had established, so that claims are permanently subject to reopening by the courts.

Barring the putative class members from reviving their claims also makes sense. Res judicata " 'is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, "of public policy and of private peace," which should be cordially regarded and enforced by the courts.' " *Federated Department Stores*, 452 U.S. at 401 (citations omitted). Res judicata establishes "certainty in legal relations" (*Sunnen*, 333 U.S. at 597). There is no repose if courts are able to order the reopening of closed cases any time they believe an administrative adjudicator has misconstrued a directive in the governing statute.[28]

In addition, the interests res judicata serves in "avoiding the cost and vexation of repetitive litigation" (*University of Tennessee,* slip op. 9) especially support its application here. The costs of reopening thousands of claims would be significant. Since the claims of putative class members were denied at least three years ago, and many of them long before that, it would be difficult to retrieve their files and locate members of the putative class. In addition, members of Congress and the Department of Labor viewed the backlog in adjudicating black lung benefits claims as unacceptable when pending claims numbered about 21,000 before administrative law judges and 5,687 before the Benefits Review Board. *1985 Hearing, 10 (statement of Sen. Rockefeller); 34 (statement of Rep. Rahall); 126-127 (Statement of Nahum Litt, Chief of the Department of Labor's Office of Administrative Law Judges). The result of this backlog was a delay of three and one-half to seven years for claimants to receive decisions on their claims (id.* at 10 (statement of Sen. Rockefeller)). It takes little imagination to perceive the drastic impact of the Eighth Circuit's decision, which could require the reexamination of 94,000 claims. Cf. *Morrison-Knudsen Construction Co.* v. *Director, Office of Workers' Compensation Programs,* 461 U.S. 624, 636-637 (1983) (interpreting Longshore and Harbor Workers' Compensation Act to permit significant increase in number of the challenges in administrative process would undermine the statutory goal of providing prompt compensation to injured workers and their survivors.[29]

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[29] It would also be difficult for individual coal mine operators or the industry-financed Black Lung Disability Trust Fund, which at the end of February 1988 was over $2.9 billion in debt to the United States Treasury, to gather evidence to meet these stale claims. The individual operators and their insurers could not reasonably have anticipated that thousands of previously-denied claims would be ordered reopened. Nor could Congress, in setting the rate of tax on coal to finance the debt-ridden trust fund (26 U.S.C. 4121(a), 9501), have anticipated the Eighth Circuit's decision.

The putative class members are not situated differently from the respondents in *Federated Department Stores* in any significant manner. In that case, several parties filed actions in federal district court, which were all dismissed. Some of the parties appealed, while others did not. While the appealed cases were pending, an intervening decision made clear that the district court had erroneously dismissed the actions and the appealed cases were accordingly remanded. The nonappealing parties then refiled essentially identical actions in order to obtain the benefit of the intervening decision, but this Court held that res judicata barred their claims. The putative class members, like the respondents in *Federated Department Stores,* failed to appeal earlier adjudications and this suit is their attempt to obtain the benefit of the favorable intervening decisions of the courts of appeals other than the Seventh Circuit. Like the nonappealing parties in *Federated Department Stores,* their attempt should be barred by res judicata.[30]

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[30] The Eighth Circuit cited (87-827 Pet. App. 16a) *Bowen* v. *City of New York*, 476 U.S. 467 (1986), in support of its conclusion that reopening is not barred because the claims had been finally denied. That case does not support the Eighth Circuit's decision to order reopening. First, the time limits under the Black Lung Benefits Act have been construed to be jurisdictional and do not allow for extensions of time as does the provision of the Social Security Act (42 U.S.C. 405(g)) at issue in *Bowen* v. *City of New York*. See 33 U.S.C. 921(c) (incorporated by 30 U.S.C. (& Supp. III) 932(a)). Second, this Court's reasoning in that case supports the conclusion that reopening is *not* appropriate here. The Court recognized that "exhaustion is the rule in the vast majority of cases" (*id.* at 486). It concluded that tolling of statutes of limitations is warranted "in the rare case such as this" (476 U.S. at 481) where an "unrevealed policy" was implemented (*id.* at 485). There was, of course, no secret policy here; the Secretary's interim regulations have been published in the Code of Federal Regulations since they were promulgated in 1978.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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APPENDIX

A. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), provides:

> (1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that –
>
> (A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;
>
> (B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;
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> (C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of title 42; and
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> (D) the Secretary of Labor, in consultation with the Director of the National Institute for

Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of –

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

B. HEW's interim regulation, 20 C.F.R. 410.490, provides:

Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than–	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

C. Labor's interim regulation, 20 C.F.R. 727.203, provides:

Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412 (a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

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STATEMENT

A. Charlie Broyles And Bill Colley

Respondent Charlie Broyles and Respondent Lisa Kay Colley's father, Bill Colley,[1] were coal miners. Charlie Broyles worked in the mines of Virginia for five years as a "coal loader" and as a "track man." (B. App. 11a; Broyles In. Dep. of Charlie Broyles, Dep. pp. 5-8; Broyles In. Dir. Ex. 2, Claim Form CM-911a, p. 1; Broyles In. Dir. Ex. 5, Claim Form CM-913, p. 1)[2] Both jobs involved heavy exposure to coal dust. (Broyles In. Dep. of Charlie Broyles, Dep. pp. 6-9; Broyles In. Dir. Ex. 5, Claim Form CM-913, p. 4) Bill Colley worked in the coal mines of Kentucky and West Virginia for at least nine and one-half years, sometimes moving carloads of coal from inside the mine to the outside and sometimes as a machine operator, a job that also involved heavy exposure to coal dust. (B. App. 24a-25a; Colley In. Tr. of Hearing, Tr., pp. 10-11, 16-17)[3]

Bill Colley and Charlie Broyles filed claims for disability benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901 *et seq.* (1982 & Supp. III 1985) (the "Act"),[4] in 1974 and 1976,

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[1] Bill Colley died in 1986, and his surviving daughter, Lisa Kay Colley, was substituted for him in the court of appeals.

[2] Citations such as "B. App. 11a" are to pages of the Appendix to the Solicitor General's Petition for Writ of Certiorari in No. 87-1095. Citations to record items not in the Appendix have three parts: (a) the item's designation in the "Index of Documents" that the Department of Labor prepares for each case appealed from the Benefits Review Board to a court of appeals (*e.g.*, "Broyles In. Dir. Ex. 2;" "Colley In. Tr. of Hearing"); (b) the name of the record item (*e.g.*, "Tr."); and (c) the relevant pages of that record item (*e.g.*, "Tr., pp. 10-11").

[3] Bill Colley introduced evidence that he had worked in the coal mines for at least twelve and one-half years. (B. App. 24a-25a) However, the administrative law judge who heard his claim found that his "qualifying miner work would not exceed 9.5 years." (B. App. 25a)

[4] The Act began as Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969). In 1972, Title IV was amended by and became known as the Black Lung Benefits Act. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 1, 86 Stat. 150 (1972). In their brief on the merits ("Secy. Br."), the federal petitioners (collectively referred to here as the "Secretary") cite the post-1972 amendments to the Act. Secy. Br. at 3 and n. 1.

respectively. (B. App. 4a) Both claimants contended that they were "totally disabled" due to "pneumoconiosis" arising "out of [their coal mine] employment"[5] and were therefore entitled to the benefits the Act provided. 30 U.S.C. § 901(a). After imposing on them the burden to prove their eligibility under the so-called "permanent" regulations at 20 C.F.R. Part 410,[6] the Secretary of Labor denied their claims. (B. App. 9a, 21a) The claimants appealed this denial to the Fourth Circuit, urging that under Section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2), they were entitled to have their eligibility determined not under the permanent Part 410 regulations but instead under "criteria . . . not . . . more restrictive" than those in the HEW

[5] Medically, "pneumoconiosis" is defined as "inflammation commonly leading to fibrosis of the lungs due to irritation caused by the inhalation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc." *Stedman's Medical Dictionary* 1108 (24th ed. 1982). The Act defines "pneumoconiosis" differently as "a chronic dust disease of the lung and its sequelae, *including respiratory and pulmonary impairments, arising out of coal mine employment*." 30 U.S.C. § 902(b) (emphasis added). The statutory definition of "pneumoconiosis" is therefore broader than the medical one in that it includes *all* respiratory and pulmonary impairments arising out of coal mine employment. But the statutory definition is also narrower than the medical one in that it encompasses only conditions arising out of coal mine employment, not other types of work. In the statutory context, therefore, to refer to "pneumoconiosis arising out of coal mine employment" is, strictly speaking, redundant. As does the Secretary, however, we distinguish the existence of the medical disease from the question of whether it arose out of coal mine employment when to do so is clarifying.

[6] All citations to 20 C.F.R. are to the 1987 edition unless otherwise indicated. The numerous citations in this brief to provisions of 20 C.F.R. usually omit the "20 C.F.R." reference. However, when we refer to the two principal regulatory provisions at issue here, we usually call them by their popular names: the "HEW interim presumption" or the "HEW interim regulation" (§ 410.490) and the "DOL interim presumption" or the "DOL interim regulation" (§ 727.203).

interim presumption at § 410.490. (B. App. 3a-5a) Under this provision, claimants who present evidence meeting specified requirements obtain the benefit of a favorable presumption of disability, which shifts the burden to the Secretary to disprove one or more elements of a claim.

As described more fully below, a Fourth Circuit panel unanimously accepted the black lung claimants' contention that the Secretary had applied an unlawfully harsh eligibility standard to their cases. (*Id.* at 1a-6a) Accordingly, the court remanded their cases to the Secretary to make new eligibility determinations under the proper criteria. (*Id.* at 5a-6a) Charlie Broyles and Lisa Colley, seeking to secure the disability benefits Congress intended for them, are now before this Court to defend that ruling.

B. The Black Lung Benefits Act And The Interim Presumptions

"Part B" of the original 1969 statute instructed the Secretary of Health, Education, and Welfare ("HEW") to process claims for black lung disability benefits filed between December 31, 1969 and December 31, 1972 and to pay, from appropriated federal funds, benefits to miners found eligible. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 411(a), 83 Stat. 793 (1969). "Part C" of the statute instructed the Secretary of Labor to process claims filed after December 31, 1972. *Id.* at § 422, 83 Stat. 796. These claims were to be paid by the miner's coal mine employer, *id.* at § 422(b), 83 Stat. 796, or if no coal mine employer could be identified due to insolvency or bankruptcy, then from federal funds. *Id.* at § 424, 83 Stat. 798.

HEW approved almost fifty percent of the black lung benefit claims it adjudicated in the first three years of the program. S. Rep. No. 743, 92d Cong., 2d Sess. 3 (1972). Congress concluded, however, that this approval rate was too low, asserting its concern that, "as provided by Congress in 1969 and as interpreted by the Social Security Administration, the provi-

sions authorizing benefits for total disability due to pneumoconiosis do not in fact benefit countless miners and their survivors who were the intended beneficiaries of the Black Lung program." *Id.* Congress recognized that deserving miners were being denied benefits because the "state of the [medical] art" was inadequate to ensure medical diagnoses of either disease or disability in many miners who were in fact "severely . . . impaired" from pneumoconiosis. *Id.* at 9. The lack of adequate medical facilities in the coal mine areas to perform diagnostic testing compounded the difficulties many miners faced in establishing the required medical proof. *Id.* at 18. Disturbed that HEW had not adjudicated a large volume of claims that miners had filed, Congress attributed the backlog to deficiencies in testing procedures and facilities that made both proof and adjudication of claims more time consuming and difficult. *Id.* at 23.

Because of its dissatisfaction with the low claims approval rate and the backlog of claims, Congress amended the Act in 1972 to make establishing eligibility easier. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972).[7] In addition, the Senate Labor and Public Welfare Committee expressed its expectation that HEW would "adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims." S. Rep. No. 743, 92d Cong., 2d Sess. 18 (1972). HEW responded to these amendments and the Committee's expecta-

[7] For example, Congress redefined "total disability" so that a claimant no longer had to prove that he was physically disabled from performing *any* job, but could establish eligibility if he could show that he was unable to engage in his usual coal mine work or comparable work. Pub. L. No. 92-303 at § 4(a), 86 Stat. 153 (amending Section 402(f) of the Act). Congress also provided that a benefit claim could no longer be denied solely on the basis of an x-ray read as "negative" for pneumoconiosis. *Id.* at § 4(f), 86 Stat. 154 (amending Section 413(b) of the Act).

tion by promulgating the HEW interim presumption at § 410.490. § 410.490(a).

Under the HEW interim regulation, a claimant could invoke a rebuttable presumption that he was "totally disabled due to pneumoconiosis" if he submitted certain specified types of evidence. As relevant here, a claimant could invoke this presumption if he proved both that he had pneumoconiosis (through x-ray, biopsy, or autopsy evidence) and that his pneumoconiosis arose out of coal mine employment. §§ 410.490(b)(1)(i), 410.490(b)(2). A claimant could meet the latter requirement, proof of disease causation, in two ways: either by introducing direct evidence of disease causation or by invoking a separate, special presumption of disease causation through showing that he had ten years of coal mining experience. § 410.490(b)(2) (incorporating §§ 410.416 and 410.456). Once the main presumption was invoked, the burden of proof shifted to the Secretary to show that the claimant was not "totally disabled." § 410.490(c).

Under the original 1969 Act, only HEW had the authority to promulgate regulations governing the determination of eligibility. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 411(b), 83 Stat. 793 (1969). The 1972 amendments kept this arrangement even for the Part C claims filed after July 1, 1973 for which the Secretary of Labor had processing responsibility. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972).[8] While HEW applied the burden-shifting interim presumption to Part B claims, it did not authorize DOL to apply the presumption to Part C claims. § 410.490(a). Instead, HEW required DOL to adjudicate its claims under the Part 410 "permanent" regulations, *see id.*, adopted the same day as the HEW interim presumption. 37

[8] The 1972 amendments to the Act postponed the commencement of the Secretary of Labor's jurisdictional responsibility under Part C from January 1, 1973 to July 1, 1973. Pub. L. No. 92-303, § 5, 86 Stat. 155 (1972).

Fed. Reg. 20641 (1972). Unlike the HEW interim presumption, the permanent regulations did not offer the claimant any opportunity to invoke a presumption of "total disability" that would shift the burden of proof to the Secretary or to the coal mine operator. §§ 410.401-410.476. Rather, a claimant was required to prove affirmatively every element of his claim: that he was (a) totally disabled, (b) by pneumoconiosis, (c) arising out of coal mine employment. §§ 410.422-410.426, 410.414, 410.416.

The distinctions between the liberal HEW interim presumption applied to Part B claims and the strict permanent regulations applied to Part C claims generated dramatically different approval rates for Part B and Part C claims. As the Part B "claims approval rate increased, Labor's remained low." *Mullins Coal Co.* v. *Director, O.W.C.P.*, 108 S. Ct. 427, 437 (1987).[9]

Evidence presented to Congress in the years after the initiation of the Part C program demonstrated the persistence of the

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[9] DOL, operating under the Part 410 permanent regulations, approved less than ten percent of the claims it adjudicated prior to the 1978 amendments. Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869, 873 n. 14 (1981). HEW, in contrast, operating under its interim presumption, approved seventy percent of the claims it adjudicated by 1976. Speech by Robert D. McGillicuddy, Assistant to the Staff Director of the House Subcomm. on Labor Standards Before the Legal Staff of the Benefits Review Board (Sept. 26, 1978), *reprinted in* House Comm. on Education and Labor, 96th Cong., 2d Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977*, 1236 (Comm. Print 1979); *see also* Letter from William J. Kilberg, Solicitor of Labor, to John B. Rhinelander, General Counsel, HEW (September 13, 1974) [hereinafter "DOL Solicitor Letter"], *reprinted in* H.R. Rep. No. 151, 95th Cong., 1st Sess. 17 (1977) ("[M]any of those claimants who can meet the interim criteria, but not the 1969 criteria are, in fact, totally disabled and should be entitled to benefits.")

problems that had led to promulgation of the HEW interim presumption—deficiencies in medical test procedures and an insufficient number of adequate medical testing facilities. H.R. Rep. No. 151, 95th Cong., 1st Sess. 15 (1977). *See Mullins*, 108 S. Ct. at 436. To several congressmen, these problems explained why DOL had denied benefits to so many of their constituents, even though the congressmen, having personally observed that these claimants had substantial breathing difficulties, believed that they were totally disabled. *See, e.g., Black Lung Benefits Reform Act of 1975: Hearings on H.R. 7, H.R. 8, and H.R. 3333 Before the Subcomm. on Labor Standards of the House Comm. On Education and Labor*, 94th Cong., 1st Sess. 144 (1975) [hereinafter *1975 Hearings*] (remarks of Rep. Perkins); 122 Cong. Rec. 4978 (1976) (remarks of Rep. Daniels). Finally, like HEW previously, DOL developed a large claims backlog requiring claimants to suffer long delays in the processing of their claims. *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 251 (1977) [hereinafter *1977 Benefits Provisions Hearings*] (testimony of Donald Elisburg, Assistant Secretary of Labor). Legislators expressed dismay over these delays. *E.g., id.* at 231 (testimony of Rep. Ertel).

Just as the low HEW claims approval rate had prompted legislation in 1972 to increase approvals in the Part B program, the much lower DOL approval rate prompted new legislative proposals to achieve the same end under the Part C program. In particular, representatives from coal mining states introduced a series of bills between 1975 and 1977 to require the Secretary of Labor to apply the HEW interim presumption to all claims. *See* pp. 28-29 and n. 28 *infra*. Such measures sought to cure the low approval rate under the Part C program by the same means (the HEW interim presumption) that HEW had developed in response to Congress' earlier dissatisfaction with the approval rate under the Part B program. The bill the House eventually passed, H.R. 4544, proposed to amend the statutory definition of "total disability" to provide:

> With respect to a claim filed after June 30, 1973, such regulations [defining "total disability"] shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973 [i.e., than those applicable under the HEW interim presumption.]

H.R. 4544, 95th Cong., 1st Sess. § 7 (1977).

A conference committee considered H.R. 4544 together with a Senate bill that sought to address the problems leading to the low approval rate by requiring the Secretary of Labor, to whom it granted rulemaking authority, to establish new "criteria for all appropriate medical tests . . . which accurately reflect total disability in coal miners." S. 1538, 95th Cong., 1st Sess. § 2 (1977). The conference committee's compromise effectuated the measures of both houses, but for different claims depending on their filing dates. The Senate measure was enacted as Section 402(f)(1)(D) and would govern claims filed *after* the effective date of the new regulations prescribed in the Section. 30 U.S.C. § 902(f)(1)(D).[10] The House measure was enacted as Section 402(f)(2) of the Act and governed all claims filed *before* the effective date of the new regulations, including all pending claims as well as all previously denied claims which were to be reopened. 30 U.S.C. §§ 902(f)(2), 945.[11]

The DOL promulgated its own interim presumption at § 727.203, 43 Fed. Reg. 36818 (1978), as its response to the Act's mandate at Section 402(f)(2) to adjudicate claims under "criteria . . . not . . . more restrictive than the criteria applicable to a claim" adjudicated under the HEW interim presumption. 30 U.S.C. § 902(f)(2). The DOL interim presumption contains

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[10] These new regulations were eventually promulgated at 20 C.F.R. Part 718, effective March 31, 1980. 45 Fed. Reg. 13678 (1980).

[11] In 1978, Congress also created the Black Lung Disability Trust Fund. Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 3(a)(1), 92 Stat. 12 (1978). This fund is responsible for all claims (1) when the last mine employment was prior to January 1, 1970, (2) when the claims were denied prior to the 1978 amendments but were granted after review under those amendments, or (3) when a responsible coal mine operator cannot be found. 30 U.S.C. § 932(j).

some criteria that are not more restrictive than those of the HEW interim presumption.[12] However, with respect to miners able to prove they have pneumoconiosis (by x-ray, biopsy, or autopsy evidence), the DOL presumption is more restrictive than the HEW presumption. Under the DOL interim regulation, such miners trigger the presumption only by proving that they worked in the coal mines for at least ten years. § 727.203(a)(1). In contrast, under the HEW interim regulation, such miners trigger the presumption *either* by proving at least ten years of coal mining experience, § 410.490(b)(2) (incorporating §§ 410.416(a) and 410.456(a)), *or* by proving that their pneumoconiosis arose out of coal mine work. § 410.490(b)(2) (incorporating §§ 410.416(b) and 410.456(b)). Thus, the DOL interim regulation fails to give claimants the option that the HEW interim regulation affords them—the ability to invoke a presumption of "total disability" by proving that their pneumoconiosis arose out of coal mine employment. Claimants unable to trigger the presumption under the DOL regulation, even if they might have invoked the presumption under the HEW interim regulation, are forced to proceed under the strict permanent regulations. § 727.203(d).[13]

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[12] Indeed, the DOL presumption is less restrictive to miners than the HEW presumption in a few respects. For example, the HEW presumption may be triggered only by an x-ray, biopsy, autopsy, or set of ventilatory studies meeting specified requirements. § 410.490(b)(1). The DOL presumption may be triggered by any of those types of evidence and also by any of three other types of evidence meeting specified requirements—a set of blood gas studies, a physician's opinion, and, where the miner is deceased, a lay affidavit of his physical condition before death. § 727.203(a).

[13] The permanent regulations under which such claimants are forced to proceed are those set out at 20 C.F.R. Part 718 "as amended from time to time." § 727.203(d). When the "new" permanent regulations at Part 718 became effective on March 31, 1980, 45 Fed. Reg. 13678 (1980), respondents Broyles' and Colley's claims were awaiting administrative hearings. Accordingly, the Secretary should have applied these regulations to their claims instead of the permanent

C. This Litigation

Charlie Broyles and Bill Colley were among the many miners whose claims the Secretary denied by applying only the strict permanent regulations to their claims after finding that they worked less than ten years in the mines. (B. App. 8a, 20a)[14] And, like other such miners, the evidence they introduced would have been sufficient to invoke a presumption of eligibility under "criteria . . . not . . . more restrictive than the criteria applicable" under the HEW interim regulation.[15] Invoking the presumption would have shifted the burden to the Secretary for rebuttal. §§ 410.490(b), 410.490(c). In contrast, under the permanent regulations, which the Secretary applied to their claims, respondents Broyles and Colley bore the burden of

Part 410 regulations. *Strike* v. *Director, O.W.C.P.*, 817 F.2d 395, 406 and n. 9 (7th Cir. 1987). However, this error is irrelevant in the current posture of the cases because the Part 718 regulations, like the permanent Part 410 regulations, contain no presumption of "total disability" that is applicable to any miners with less than ten years of coal mine experience.

[14] Our fellow black lung respondents in Nos. 87-821 and 87-827 represent a proposed class of miners whose claims were denied for the same reason but are no longer pending. In addition to the Secretary, the petitioners in these two cases include four coal companies and two insurance companies (the "private petitioners"). We refer to their brief here as "Priv. Br."

[15] In Mr. Broyles' case, the administrative law judge found both that he had pneumoconiosis and that the pneumoconiosis arose out of coal mine employment. (B. App. 15a-16a) These findings satisfy §§ 410.490(b)(1)(i) and 410.490(b)(2), respectively, and therefore would invoke the HEW interim presumption as a matter of law.

The evidence in Mr. Colley's case is also sufficient to invoke the HEW interim presumption. A board-certified radiologist read the more recent of two x-rays positive for pneumoconiosis (B. App. 25a); and the report of the physician who examined Mr. Colley most recently concluded that his pneumoconiosis arose out of coal mine employment. (*Id.* at 27a)

proving affirmatively that they were "totally disabled" and that such disability arose out of coal mine employment (i.e., disability causation). §§ 410.422-410.426.

The claimants took separate appeals from the final administrative decisions denying them benefits. The Fourth Circuit, after consolidating the two cases, reversed each of the Benefits Review Board's decisions on the ground that the "ALJ erred in failing to evaluate the claims under the [HEW interim presumption]." (*Id.* at 2a) The court concluded that Section 402(f)(2) of the Act offered a "clear mandate" for application of the "liberal [HEW] interim presumption" to the claims before it. (*Id.* at 5a) It rejected the Secretary's argument that she need apply to these claims only "medical criteria" not more restrictive than those in the HEW interim presumption. (*Id.*)[16] The Secretary's petition for rehearing *en banc* was denied. (B. App. 29a)

SUMMARY OF ARGUMENT

A. In Section 402(f)(2) of the Act, Congress required the Secretary of Labor to adjudicate certain claims, including those of respondents Broyles and Colley, using eligibility criteria "not . . . more restrictive than the criteria applicable to a claim" under the HEW interim regulation. The black lung claimants interpret that mandate to require the Secretary to apply to their claims *all* criteria that in combination establish "total disability" under the HEW interim regulation. They submit that the DOL interim presumption, which is the Secretary of Labor's response to Section 402(f)(2), is not faithful to the Section's mandate because it deprives black lung claimants who can prove they have pneumoconiosis (by x-ray, biopsy, or

[16] Unlike the Eighth Circuit in Nos. 87-821 and 87-827, the Fourth Circuit had no occasion to address any remedial question involving the applicability of its ruling respecting Section 402(f)(2) of the Act to a class of claimants. For this reason, respondents Broyles and Colley address only the substantive Section 402(f)(2) issue in this brief, and not the related remedial issues presented in Nos. 87-821 and 87-827.

autopsy evidence), § 410.490(b)(1)(i), of a right that the HEW interim presumption affords them—the ability to trigger a presumption of "total disability" by proving that their pneumoconiosis arose out of coal mine employment. § 410.490(b)(2) (incorporating §§ 410.416(b), 410.456(b)). The Secretary proffers an erroneous interpretation of the statute under which the term "criteria" in Section 402(f)(2) is "shorthand" for the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D). In her view, Section 402(f)(2) required her only to apply "all appropriate medical tests" of the HEW interim presumption, and the DOL interim presumption does that. The private petitioners make similar erroneous contentions.

B. Section 402(f)(2) does not use the word "medical" (or any variant of "medical") to modify the term "criteria." This fact refutes the position of the Secretary and the private petitioners that Congress was referring only to "medical tests" or "medical criteria" and thereby provides strong textual support for the black lung claimants' interpretation of the statute. So does the preceding provision, Section 402(f)(1)(D), in which Congress did modify the term "criteria" by following it with the restrictive clause "for all appropriate medical tests . . . which accurately reflect total disability in coal miners." 30 U.S.C. § 902(f)(1)(D). That textual dichotomy is pivotal, for "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citations omitted). The reason that Congress would not have used the word "criteria" in Section 402(f)(2) to mean the same thing as the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D) is that the two sections have entirely different functions under the statute. Moreover, the Act is replete with express cross-references from one section to another, a drafting pattern that contradicts the Secretary's notion that Section 402(f)(2) implicitly refers to Section 402(f)(1)(D).

C.1. The completely independent legislative lineages of Sections 402(f)(1)(D) and 402(f)(2) establish that Congress never intended the latter provision to refer to the former.

2. The legislative history includes statements about the measures that became Section 402(f)(2) in which the speakers used the word "medical" to modify the word "criteria," "standards," or "regulations." Although the Secretary and the private petitioners contend that such references support their position, they do not. Legislators and others used these words as terms-of-art to mean all criteria necessary to prove eligibility, not merely criteria that are strictly medical. Moreover, the legislative history includes other statements about the same measures in which the speakers used the word "criteria" or "standards" without any modification at all. Because these references, by their terms, do not limit the ambit of the term "criteria" to medical criteria, they support the black lung claimants' position. In any event, the respect in which the DOL interim presumption is more restrictive than the HEW interim presumption—proof that the miner's pneumoconiosis arose out of coal mine employment—*is* a "medical criterion."

3. Although the HEW interim regulation enabled miners with less than ten years mining experience to trigger the presumption of disability, the Secretary says that evidence presented before enactment of the 1978 amendments persuaded Congress that miners with less than ten years of mining experience rarely contract black lung disease. This argument is wholly insubstantial for several reasons, including the fact that the only evidence from the legislative history on which the Secretary relies contradicts her position.

D. The clarity of the statutory language and the support the legislative history lends claimants' interpretation of Section 402(f)(2) make deference to the Secretary's interpretation of the statute inappropriate. Furthermore, Congress expected that in interpreting the 1978 amendments, the Secretary of Labor would "give the benefit of any doubt to the coal miner."

S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977). This directive, to which the Department of Labor has bound itself, § 718.3(c), requires the Secretary to adopt the black lung claimants' reasonable interpretation of the statute.

E. The private petitioners' contention that a court is without authority to direct the Secretary to apply the HEW interim presumption because she has never published it in accordance with the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (the "APA"), is meritless. With respect to the claims subject to Section 402(f)(2), the HEW interim presumption is not a "rule" at all. Rather, because Congress incorporated it in Section 402(f)(2), it gained the force and effect of a statute, which is not subject to the rulemaking provisions of the APA. 5 U.S.C. §§ 551(1)(A), 551(4).

ARGUMENT

THE DOL INTERIM PRESUMPTION FAILS TO IMPLEMENT THE MANDATE OF SECTION 402(f)(2) OF THE ACT, AND TO ENFORCE THAT MANDATE A COURT MAY DIRECT THE SECRETARY OF LABOR TO APPLY THE HEW INTERIM PRESUMPTION

The question in this case is whether the DOL interim presumption at 20 C.F.R. § 727.203 is faithful to Section 402(f)(2) of the Act. Four of the five courts of appeals to have addressed the question and the respondent black lung claimants say it is not; the Secretary of Labor and the private petitioners say it is. The resolution of the controversy turns on the meaning of Section 402(f)(2), which provides that "[c]riteria applied by the Secretary of Labor in [certain claims] . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." 30 U.S.C. § 902(f)(2).

The terms of the debate are by now well defined. All parties agree that the class of claims to which Section 402(f)(2) applies are the claims pending or to be reopened under Section 435 of the Act, 30 U.S.C. § 945, as well as the "new" claims filed before the Secretary promulgated new permanent eligibility regulations pursuant to Section 402(f)(1). Secy. Br. at 7; Priv.

Br. at 21. All parties also agree that the phrase in Section 402(f)(2) beginning "not . . . more restrictive" means that the "criteria" the Secretary is to apply must be at least as favorable to the individual black lung claimant as the "criteria" of the HEW interim presumption at § 410.490. Secy. Br. at 7, 17-18; Priv. Br. at 22. In this context, the dispute between the black lung claimants, on the one hand, and the combined forces of the Secretary of Labor and the coal and insurance industries, on the other, has centered on *which* "criteria" Congress was referring to in Section 402(f)(2).[17] *See Broyles* v. *Director, O.W.C.P.*, 824 F.2d 327, 329-30 (4th Cir. 1987); *Kyle* v. *Director, O.W.C.P.*, 819 F.2d 139, 142-43 (6th Cir. 1987), *petitions for cert. filed*, 56 U.S.L.W. 3463, 3484 (U.S. Jan. 12, 19, 1988) (Nos. 87-1045, 87-1065); *Strike* v. *Director, O.W.C.P.*, 817 F.2d 395, 400 (7th Cir. 1987); *Coughlan* v. *Director, O.W.C.P.*, 757 F.2d 966, 968 (8th Cir. 1985); *Halon* v. *Director, O.W.C.P.*, 713 F.2d 21, 24 (3d Cir. 1983) ("*Halon II*"), *reinstating* 713 F.2d 30, 31 (3d Cir. 1982) ("*Halon I*").

The Secretary's current position is that the "criteria" referred to in Section 402(f)(2) are "all appropriate medical tests" in the HEW interim presumption. Secy. Br. at 15, 22.[18]

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[17] The Secretary misframes the inquiry when she initially suggests that the dispute among the parties concerns the meaning of the word "criteria" itself. Secy. Br. at 17 and n. 15. She accentuates the misfocus by concluding that the term is ambiguous. *Id.* The word "criteria" is not ambiguous. While Congress did not define it in the statute, Congress is assumed to use words in their ordinary way. *Richards* v. *United States*, 369 U.S. 1, 9 (1962). The ordinary meaning of "criteria" is the one the Secretary ascribes to it: a "standard on which a judgment or decision is based." Secy. Br. at 17 n. 15 (citing *Webster's New Collegiate Dictionary* 307 (1983)). Using the Secretary's definition, the question here may properly be understood as asking what were the particular "standards" Congress had in mind in Section 402(f)(2), not what the term "standard" means.

[18] The Secretary also frequently asserts that the term "criteria" in Section 402(f)(2) refers to the "medical criteria" in the HEW pre-

The private petitioners' position is that the "criteria" referred to in Section 402(f)(2) of the Act are "the medical bases for invocation [of the HEW interim presumption.]" Priv. Br. at 22. The black lung claimants' understanding of the statute is that the "criteria" referred to in Section 402(f)(2) are *all* the criteria in the HEW interim presumption that in combination establish "total disability."

The claimants' understanding of the statute is correct. The language of Section 402(f)(2), *see* § B *infra*, and its legislative history, *see* § C *infra*, each require that conclusion. While the Secretary and the private petitioners appeal to the deference ordinarily paid to the Secretary's construction of the Act, no such deference is owing here. *See* § D *infra*.

A. The DOL Interim Presumption Is More Restrictive Than The HEW Interim Presumption With Respect To A "Total Disability" Criterion

The DOL and HEW interim presumptions both offer the black lung claimant a means of establishing that he is "totally disabled [because] pneumoconiosis prevents him or her from engaging in [his or her usual coal mine work or comparable work]." 30 U.S.C. § 902(f)(1)(A); *see also* §§ 410.490(b), 727.203(a). However, the DOL presumption is more restrictive (i.e., is less favorable to claimants) than the HEW presumption. Specifically, to trigger the DOL presumption, claimants able to prove that they have pneumoconiosis (by x-ray, biopsy, or autopsy evidence) must also prove that they worked in the coal mines for at least ten years. § 727.203(a). In contrast, to

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sumption (Secy. Br. at 14, 17-18, 19, 22 n. 18, 27), a category of criteria which, at least in common parlance, is broader than "medical tests." She uses shifting formulations of her position on the key question in this case because the support she says she finds in the words of the statute bears only on her "medical test" formulation, *see* pp. 22-26 *infra*, while the primary support she says she finds in the legislative history bears instead only on her broader "medical criteria" formulation. *See* pp. 32-39 *infra*.

trigger the HEW presumption, claimants able to prove that they have pneumoconiosis (also by x-ray, biopsy, or autopsy evidence) have a choice: they may prove *either* that they worked in the coal mines for at least ten years, § 410.490(b)(2) (incorporating §§ 410.416(a) and 410.456(a)), *or* that their pneumoconiosis arose out of coal mine employment. § 410.490(b)(2) (incorporating §§ 410.416(b) and 410.456(b)). Because the DOL interim regulation deprives claimants of the ability to trigger the presumption of "total disability" by proving that their pneumoconiosis arose out of coal mine employment [hereinafter "proof of disease causation"], that regulation is less favorable to claimants than the HEW interim regulation.[19] Both the Secretary and the private petitioners concede this.

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[19] The Secretary and the private petitioners call the criterion that renders the DOL presumption less favorable to claimants than the HEW presumption the "ten year coal mining requirement" of the DOL presumption. Secy. Br. at 14, 15, 18, 23, 24 n. 19; Priv. Br. at 18, 27 and n. 36, 29. This characterization is inaccurate. As noted in the text, *both* the DOL and the HEW interim regulations allow those claimants able to prove pneumoconiosis (by x-ray, biopsy, or autopsy evidence) to trigger a presumption of "total disability" by proving that they worked in the mines for at least ten years. But the decisive fact is that the HEW regulation provides claimants with an *additional* option for invoking the same presumption that the DOL regulation does not provide—proving that their pneumoconiosis arose out of coal mine employment. The DOL presumption is therefore "more restrictive" than the HEW presumption with respect to the proof of disease causation criterion, not the ten-year coal mining criterion.

The erroneous characterization that the Secretary and private petitioners proffer should not be allowed to deflect attention from the fact that the actual respect in which the DOL presumption is "more restrictive" than the HEW presumption— proof of disease causation —is a "medical criterion." This fact defeats the private petitioners' interpretation of Section 402(f)(2) on its own terms. *See* pp. 37-39 *infra*.

Secy. Br. at 8, 11; Priv. Br. at 11-12.[20]

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[20] The private petitioners point out that the HEW presumption on its face contains only two rebuttal methods by which a claim can be defeated (§§ 410.490(c)(1) and 410.490(c)(2)), whereas the DOL presumption contains not only these same rebuttal methods (§§ 727.203(b)(1), 727.203(b)(2)) but also two additional rebuttal methods (§§ 727.203(b)(3), 727.203(b)(4)). Priv. Br. at 12-13. They therefore conclude that these additional rebuttal methods—which allow them to defeat a claim by showing that the miner's disability did not arise out of coal mine employment or that he does not have pneumoconiosis—are additional respects in which the DOL presumption is less favorable to claimants than the HEW presumption. *Id.* They nevertheless maintain that the DOL presumption complies with the Act. *Id.* at 19-30. The Secretary, however, says that she "does not think that the rebuttal methods set out in HEW's interim regulation were meant to be exhaustive," Secy. Br. at 26 n. 21, and that application of the additional rebuttal methods of the DOL presumption is required by the "command" of Section 413(b) of the Act, 30 U.S.C. § 923(b), that "all relevant evidence shall be considered." Secy. Br. at 26-27.

The black lung claimants agree with the Secretary's position in this respect, especially because the conference committee report on the bill that enacted the 1978 amendments ties this directive of Section 413(b) directly to Section 402(f)(2). H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978) (for claims subject to Section 402(f)(2) of the Act, the Secretary "shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, *except that* in determining claims under such criteria *all relevant medical evidence shall be considered*" (emphasis added)); *see also* 30 U.S.C. § 901(a) (describing the elements of a claim, which include proof of pneumoconiosis and disability causation). The Sixth Circuit has apparently adopted this rationale in requiring application of all the rebuttal methods of the DOL interim regulation in cases to which the favorable invocation criterion of the HEW interim regulation must be applied. *Warman* v. *Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 258 n. 1 (6th Cir. 1988) (relying on *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985), which held that the "all relevant medical evidence" exception in the conference committee report demonstrates Congress' intent to allow more restrictive rebuttal of the interim presumption in Part C cases than in Part B cases, *id.* at 489-90); *see also* *Prater* v. *Hite Preparation Co.*, 829 F.2d 1363, 1366 n. 2 (6th Cir. 1987). No other circuit has considered whether the Act allows the Secretary to apply the rebuttal provisions of the DOL interim regulation to claims in which she must apply the invocation provisions of the HEW interim regulation. Contrary to the private petitioners' contention (Priv. Br. at 15), this issue was not addressed below or in *Sulyma* v. *Director, O.W.C.P.*, 827 F.2d 922 (3d Cir. 1987).

The Secretary and the private petitioners also contend that if the Act were read to deny coal operators the ability to defeat a claim using the additional rebuttal methods of the DOL interim presumption, the Act would violate the due process clause of the fifth amendment. Secy. Br. at 26-27; Priv. Br. at 30-34. There is no occasion to consider this question, which was not presented below or in the petitions for certiorari. For, as explained in this note, the black lung claimants agree with the Secretary that the Act does authorize her to apply the additional rebuttal methods of the DOL interim presumption in cases to which the HEW interim presumption must be applied.

Moreover, the HEW presumption makes proof of disease causation a criterion for establishing "total disability," the subject of Section 402(f)(2). The claimant triggers a presumption of "total disability" under the HEW presumption only by satisfying a *combination* of criteria—as relevant here, proof of pneumoconiosis (through x-ray, biopsy, or autopsy evidence) combined with proof of disease causation. Put differently, for the black lung claimants here, proof of disease causation is a *sine qua non* of access to the presumption of "total disability" under the HEW presumption; and without access to a presumption of "total disability," claimants are consigned to the so-called permanent regulations, all versions of which have always provided extremely rigorous criteria for proving "total disability" affirmatively. *See* §§ 410.424-410.426, 718.204.[21] Thus,

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[21] The approval rates have always been much higher for classes of claims to which the DOL or the HEW interim presumption has been applicable than for classes of claims to which only a version of the permanent regulations has been applicable. Solomons, n. 9 *supra* at 873; Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 694-95 (1983); *see also* n. 9 *supra*.

the HEW interim presumption ascribes a significance to proof of disease causation that goes beyond the issue of disease causation itself; access to a presumption of "total disability" is dependent on proof of disease causation.[22] The Secretary and the private petitioners are therefore wrong in contending that "total disability" and disease causation are separate issues. Secy. Br. at 18; Priv. Br. at 27 n. 36.

In sum, both the Secretary and the private petitioners acknowledge that the DOL presumption is more restrictive to claimants than the HEW presumption. Moreover, the respect in which the DOL presumption is more restrictive than the HEW presumption is a "total disability" criterion. Thus, in order to avoid Section 402(f)(2)'s mandate, the Secretary and the private petitioners must proffer constructions of Section 402(f)(2) that would exclude from its ambit a particular "criterion" that they acknowledge does make the DOL presumption "more restrictive" than the HEW presumption. The particular construction of Section 402(f)(2) they do advance forces claimants to proceed under the more rigorous permanent regulations. This result is difficult to square with the fact that Congress enacted Section 402(f)(2) precisely to correct "Labor's low claims approval rate" under the permanent regulations. *Mullins*, 108 S. Ct. at 437. The Secretary's interpretation appears to continue the "pattern of unduly strict administration of benefits" that has plagued the black lung benefits program since it began. *Echo* v. *Director, O.W.C.P.*, 744 F.2d 327, 330 (3d Cir. 1984).

[22] Separate from the operation of the HEW interim presumption, the statutory definition of "total disability" at Section 402 (f) encompasses proof of disease causation. Section 402(f)(1)(A) provides that a miner unable to perform his former coal mine work is "totally disabled" only when "pneumoconiosis" is responsible for his impairment. 30 U.S.C. § 902(f)(1)(A). And the term "pneumoconiosis" in Section 402(f)(1)(A) is itself a term whose statutory definition encompasses only diseases caused by coal mine employment. 30 U.S.C. § 902(b). Accordingly, as an element of the statutory definition of "pneumoconiosis," which is itself an element of the statutory definition of "total disability," proof of disease causation is essential to proof of "total disability."

B. The Plain Language Of Section 402(f)(2) Prohibits The Secretary From Applying Any "Total Disability" Criteria—Whether Non-Medical Criteria, Medical Tests, Or Other Medical Criteria—That Are More Restrictive Than Those Of The HEW Interim Presumption

There is "no more persuasive evidence" of Congress' intent in enacting a statute than the "words by which [it] undertook to give expression to its wishes." *United States* v. *American Trucking Assoc'ns, Inc.*, 310 U.S. 534, 543 (1940). Nonetheless, the Secretary and the private petitioners studiously avoid grappling with the language of the Act in any significant way. Secy. Br. at 17-18; Priv. Br. at 21-22 and n. 31. The language of the statute deserves much more attention than they give it. *See Consumer Prod. Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980).

As noted above, the Secretary and the private petitioners contend that Congress used the word "criteria" in Section 402(f)(2) to refer only to "medical tests" or "medical criteria." But Section 402(f)(2) does not use the word "medical" (or any variant of "medical") at all. The limitation that petitioners seek to impose on the "criteria" to which Section 402(f)(2) refers is therefore one that finds no support in the words of that provision itself. In contrast, that the term "criteria" is not limited in any way in the Section provides strong textual support for the black lung claimants' interpretation.

Moreover, considering that Section 402(f)(2) is part of the statutory definition of "total disability" in Section 402(f), the most natural reading is that the term "criteria" refers to all criteria that in combination establish such disability, including non-medical criteria as well as medical tests and other medical criteria. To conclude that the word "criteria" in Section 402(f)(2) refers only to some of the criteria germane to "total

disability" divorces the word "criteria" from its statutory anchor.

The meaning of the word "criteria" in Section 402(f)(2) is also informed by the two preceding provisions: Sections 402(f)(1)(C) and 402(f)(1)(D). Section 402(f)(1)(C) requires that the "regulations [defining 'total disability'] shall not provide more restrictive *criteria* than those applicable under [the definition of disability for the social security disability program at] section 423(d) of Title 42." 30 U.S.C. § 902(f)(1)(C) (emphasis added). As in Section 402(f)(2), Congress did not modify the term "criteria" in Section 402(f)(1)(C). In Section 402(f)(1)(D), on the other hand, Congress did modify the term "criteria" by following it with the restrictive clause "for all appropriate medical tests . . . which accurately reflect total disability in coal miners." 30 U.S.C. § 902(f)(1)(D). Thus, twice, in Sections 402(f)(1)(C) and 402(f)(2), Congress *did not* expressly modify the term "criteria," but in Section 402(f)(1)(D), Congress *did* modify the term with a restrictive clause. That textual dichotomy is pivotal. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citations omitted).

This principle of statutory construction repudiates what meager support the Secretary and the private petitioners try to draw from the face of the statute. The Secretary states that the word "criteria" in Section 402(f)(2) is "shorthand for the phrase 'criteria for all appropriate medical tests' [in Section 402(f)(1)(D)]." Secy. Br. at 15. The private petitioners do not see such a direct linkage but suggest that since the word "criteria" in Section 402(f)(1)(D) "directly relates to 'criteria for . . . medical tests,'" the word "criteria" in Section 402(f)(2) implies a "reference to medical data or medical standards only." Priv. Br. at 21 n. 31. These interpretations contradict the principle of *Russello* because they proceed from the illogical

assumption that the different language Congress used in the two sections should be accorded a single meaning. The interpretation of the black lung claimants, on the other hand, honors the *Russello* principle because it proceeds from the common sense understanding that when Congress used different words it meant to say different things.[23]

Congress used different words to say different things in Sections 402(f)(2) and 402(f)(1)(D) because the two sections have entirely different functions. One of the respects in which the Secretary's reliance on Section 402(f)(1)(D) is textually selective is that she ignores the language that defines the distinctive function of that Section. The Secretary's position draws on Section 402(f)(1)(D) only for the phrase "criteria for all appropriate medical tests," but the Section actually requires the Secretary to establish "criteria for all appropriate medical tests . . . *which accurately reflect total disability in coal miners.*" 30 U.S.C. § 902(f)(1)(D) (emphasis added). The language of this Section that the Secretary discards demonstrates that the function of the Section was to mandate the creation of medical test standards that, *independently of any other criteria*, would establish whether a miner is disabled.

In contrast, the standards for the medical tests common to the DOL and HEW interim presumptions (x-rays and ventilatory studies) were never designed to "accurately reflect total disability in coal miners." Rather, under the interim presumptions these medical tests are devices that, *in combination with the other invocation criteria*, serve to shift the burden to the opposing party to disprove the miners' disability. *See*

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[23] While the Sixth Circuit in *Kyle* expressly relied on the *Russello* principle in adopting the construction of Section 402(f)(2) that the black lung claimants advance, *Kyle*, 819 F.2d at 143, the Seventh Circuit failed even to consider that principle when, in *Strike*, it became the only court to accept the Secretary's proffered interpretation. *Strike*, 817 F.2d at 401.

Mullins, 108 S. Ct. at 435-38 and nn. 26, 28.[24] Because claims subject to Section 402(f)(2) must be evaluated by "criteria" that are "not . . . more restrictive than the criteria applicable to a claim" adjudicated under the HEW interim presumption, establishing the disability of miners in Section 402(f)(2) claims requires consideration of the interim presumption medical test standards in conjunction with other criteria.

In sum, the functions of Sections 402(f)(1)(D) and 402(f)(2) are entirely different. Section 402(f)(1)(D) mandates the creation of "medical test" standards that, independently of other criteria, *would establish* whether a miner is disabled once the regulations incorporating the medical test standards were eventually published sometime after enactment of the 1978 amendments to the Act. *See* 20 C.F.R. Part 718 (1981). On the other hand, Section 402(f)(2) requires that the claims subject to the Section be adjudicated using "criteria" that existed before June 30, 1973, including medical test standards that *do not establish* whether a miner is disabled *except* in conjunction with other "criteria." In view of the different functions of Sections 402(f)(1)(D) and 402(f)(2), it is hardly likely that Congress would have used the word "criteria" in the latter section to mean the same thing as the words "criteria for all appropriate medical tests" in the former section. *See also* § C.1 *infra* (discussing the independent legislative lineages of Sections 402(f)(1)(D) and 402(f)(2)).

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[24] When the private petitioners repeatedly criticize the HEW interim regulation because its medical test standards do not accurately determine disability (Priv. Br. at 8-9, 23, 31-32), they exhibit their misunderstanding of the operation of that regulation. Whether or not a miner is disabled is ultimately determined using the various rebuttal methods, not using the medical test requirements set forth in the invocation provisions of the regulation. The medical tests for invocation are only presumptive burden-shifting devices. The various rebuttal methods come into operation after the presumption has been triggered under the invocation criteria.

The Secretary's reliance on Section 402(f)(1)(D) is textually selective in another respect that further demonstrates the weakness of her position. While the Secretary contends that Section 402(f)(2) is linked to Section 402(f)(1)(D), she ignores Section 402(f)(1)(C) entirely. But, as noted above, in both Sections 402(f)(1)(C) and 402(f)(2), Congress used the word "criteria" without modification, whereas in Section 402(f)(1)(D) Congress did modify the word "criteria." Moreover, Sections 402(f)(1)(C) and 402(f)(2) both include a "not . . . more restrictive" mandate, while Section 402(f)(1)(D) does not. Accordingly, if Section 402(f)(2) is linked to any prior provision, that provision would be Section 402(f)(1)(C), in which the term "criteria" clearly refers to both medical and non-medical standards. 30 U.S.C. § 902(f)(1)(C) (requiring application of criteria not more restrictive than those applicable under 42 U.S.C. § 423(d), which defines disability in terms of whether a claimant's "impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, *considering his age, education, and work experience*, engage in any other kind of substantial gainful work" (emphasis added)).[25]

Furthermore, if Congress used "shorthand" in Section 402(f)(2) to refer to Section 402(f)(1)(D), then it used a style of draftsmanship it consistently disavowed elsewhere in the statute. The Act, including the 1978 amendments, is replete with express cross-references from one section to another. *E.g.*, 30

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[25] The private petitioners, citing 20 C.F.R. §§ 404.1511(a) and 404.1525, say that "SSA rules employ the term 'criteria' to mean medical guides for total disability." Priv. Br. at 21 n. 31. On that basis, they conclude that Congress must also have understood the term "criteria" in Section 402(f)(1)(C) to refer to "medical data or medical standards only." *Id.* This conclusion is incorrect because the SSA disability program rules, including eligibility rules, also frequently use the word "criteria" to refer to standards other than medical standards. *E.g.*, 20 C.F.R. §§ 404.463(a), 404.1567(a), 404.1569, 404.1574(b), 404.1599(d), 416.121(d), 416.520(b)(4), 416.537(b), 416.553, 416.1161a(b)(2), 416.1202(a), 416.1203, 416.1262.

U.S.C. §§ 902(i); 921(b), (c)(4), (c)(5); 922(a)(3), (a)(4), (a)(5), (b); 923(d); 924(a)(2). Indeed, Section 402(f)(2) itself refers to Section 435; and Section 402(f)(1)(D) refers to Section 402(f)(1)(A). When Congress wanted to subject one statutory provision to another, or require the Secretary to interpret one provision in light of another, it did so expressly, by telling the Secretary in the statute the specific provision it had in mind. This drafting pattern contradicts the Secretary's notion that Section 402(f)(2) implicitly refers to Section 402(f)(1)(D).

Finally, the Secretary also tries to derive support from the fact that Section 402(f)(2) is part of the statutory definition of "total disability" at Section 402(f). She says that "[i]f Congress had intended to require Labor to apply HEW's interim presumption in its entirety, it presumably would have amended the statutory presumption provision, 30 U.S.C. 921(c)(4), to mandate the use of that provision." Secy. Br. at 18.[26] This theory is wrong because it ignores the close relationship between the HEW presumption and the statutory definition of "total disability" in Section 402(f). Section 402(f) has always defined "total disability," and the HEW presumption implemented that definition by enumerating the combinations of criteria—medical tests, other medical criteria, and non-medical criteria—necessary to establish a presumption of "total disability." Both the HEW presumption and Section 402(f) of the Act focus on the facts that must be proven *in order to* establish "total disability." In contrast, the fifteen-year statutory presumption, 30 U.S.C. § 921(c)(4), focuses only on the other facts that are established if a claimant *has already* proven a disabling impairment. Accordingly, when Congress chose to make the HEW presumption a statutory standard, amending the definition of "total disability" at Section 402(f) was the logical way to do so.

[26] Section 411(c)(4), 30 U.S.C. § 921(c)(4), provides, in relevant part: "If a miner was employed for fifteen years or more in one or more underground coal mines, . . . and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis . . . . The Secretary may rebut such presumption only by establishing that (A) such miner does not . . . have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."

C. The Legislative History Of Section 402(f) Supports The Black Lung Claimants' Interpretation Of The Statute

Because the language of Section 402(f) is clear, any consideration of its legislative history should be limited to determining whether there is "clearly expressed legislative intention" contrary to the statutory language sufficient to call into question the "strong presumption that Congress expresses its intent through the language it chooses." *INS* v. *Cardoza-Fonseca*, 107 S. Ct. 1207, 1213 n. 12 (1987). In any event, the legislative history supports the black lung claimants' interpretation of the statute here.

1. The Completely Independent Legislative Lineages Of Sections 402(f)(1)(D) And 402(f)(2) Establish That Congress Never Intended The Latter Provision To Refer To The Former

The Secretary argues that Congress intended the term "criteria" in Section 402(f)(2) to refer to the phrase "criteria for all appropriate medical tests" in the preceding provision, Section 402(f)(1)(D). As do the words of the statute, the legislative history decisively refutes this argument. Although both provisions were added to the Act by the 1978 amendments, their completely independent legislative lineages make it clear that Congress did not intend Section 402(f)(2) to refer to Section 402(f)(1)(D).

The 1978 amendments were the product of a conference bill, H.R. 4544, 95th Cong., 2d Sess. (1978). The bill the Senate passed, S. 1538, proposed to amend the statutory definition of "total disability" to provide:

> [The] Secretary [of Labor], in consultation with the Director of the National Institute for Occupational Safety and Health [NIOSH], shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners. . . .

S. 1538, 95th Cong., 1st Sess. § 2 (1977). This language was virtually identical to that which became Section 402(f)(1)(D) of the Act. When promulgated, the new medical test criteria the bill prescribed were to be applied to claims then pending and thereafter filed, but not to claims previously adjudicated. S. Rep. No. 209, 95th Cong., 1st Sess. 14 (1977). But that bill contained no provision like the one that became Section 402(f)(2) of the Act.

The bill the House passed, H.R. 4544, proposed to amend the statutory definition of "total disability" to provide:

> With respect to a claim filed after June 30, 1973, such regulations [defining "total disability"] shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973.

H. R. 4544, 95th Cong., 1st Sess. § 7 (1977).[27] Section 12 of

[27] Section 7 of H.R. 4544 originated with a proposal by the United Mine Workers ("UMW"). It urged Congress to amend the Act by adding a provision reading:

> The standards for determining whether a miner who filed a claim after July 1, 1973 is totally disabled due to pneumoconiosis shall not be more restrictive than the standards prescribed by the Secretary [of HEW] for evaluating claims filed prior to July 1, 1973.

Black Lung Amendments of 1973: Hearings on H.R. 3476, H.R. 8834, H.R. 8835, and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st & 2d Sess. 349 (1973-1974) [hereinafter *1974 Hearings*]. Arnold Miller, President of the UMW, explained the intent of the Union's proposal when he presented testimony urging that the "interim standards established by the 1972 amendments . . . become the permanent standards used . . . in processing black lung claims." *Id.* at 117. The legislative history contains no hint that the Union understood its proposal as one that would require only the application of the interim "medical test" standards or "medical criteria" to black lung claims. The intent of the UMW was obviously to secure for its members the benefit of all the interim presumption eligibility standards, which were decidely more liberal than those of the permanent regulations. *See* pp. 5-6 and nn. 9, 21 *supra*.

H.R. 4544 also provided that the "not . . . more restrictive" mandate would govern the adjudication of all pending claims and the readjudication of all claims previously denied. While the relevant language of Section 7 of the bill was virtually identical to that which became Section 402(f)(2) of the Act, the bill contained no provision even remotely similar to that which became Section 402(f)(1)(D). Thus, the bill contained no phrase like "criteria for all appropriate medical tests" to which the word "criteria" in Section 7 of the bill could have referred.[28]

The conference bill brought together the provisions that became Sections 402(f)(2) and 402(f)(1)(D). H.R. 4544, 95th Cong., 2d Sess. § 2 (1978). But it did so in order to effectuate the conference committee's straightforward trade, the terms of which are apparent on the face of the statute. Both houses of Congress got exactly what they wanted, but for different claims depending on their filing dates. Section 402(f)(1)(D) embodied the Senate's approach, which prevailed as to claims filed after the Secretary promulgated new permanent regula-

[28] Five other bills were introduced in the House before H.R. 4544. The first three, like H.R. 4544, included the provision that became Section 402(f)(2) of the Act but not the provision that became Section 402(f)(1)(D). H.R. 2913, 94th Cong., 1st Sess. § 3 (1975); H.R. 3333, 94th Cong., 1st Sess. § 3 (1975); H.R. 10760, 94th Cong., 1st Sess. § 7 (1975). The other two bills did include both provisions, but in each bill the provision that became Section 402(f)(2) of the Act *preceded* the provision that became Section 402(f)(1)(D). H.R. 1532, 95th Cong., 1st Sess. § 2 (1977); H.R. 4389, 95th Cong., 1st Sess. § 2 (1977). This order belies any conclusion that the word "criteria" in the provision that became Section 402(f)(2) ever referred to the phrase "criteria for all appropriate medical tests" in the provision that became Section 402(f)(1)(D).

tions including the new "medical test" criteria prescribed by the Section. Section 402(f)(2) embodied the approach of the House, which prevailed for all claims previously denied, all claims then pending, and all claims filed until the Secretary of Labor promulgated new permanent regulations. While the conference bill had to bring the two provisions together in order to effectuate the committee's trade, nothing in the legislative history suggests that Congress brought the provisions together so that one of them could implicitly refer to the other.

2. The Statements In The Legislative History Using The Word "Criteria" Or The Like Support The Black Lung Claimants' Interpretation Of Section 402(f)(2)

a. The Numerous References In Which The Word "Criteria" Or "Standards" Is Used Without Modification Support The Claimants' Interpretation

The legislative history includes statements about the measures that became Section 402(f)(2) in which the speakers used the word "medical" to modify the word "criteria," "standards," or "regulations." Secy. Br. at 20-21 (citing statements); Priv. Br. at 23-25 (same). The Secretary and the private petitioners contend that such references support their position. *Id.* As discussed in § C.2.b *infra*, they do not. In any event, the legislative history includes other statements about the same measures in which the speakers used the word "criteria" or "standards" without ~~any~~ modification at all. Because these references, by their terms, do not limit the ambit of the term "criteria" to medical criteria, they support the black lung claimants' position that Congress did not intend any such limitation of the term "criteria" in Section 402(f)(2).

For example, in urging passage of the conference bill that was enacted, Representative Perkins stated:

> [A]ll of the denied and pending claims subject to review under the legislation will be evaluated according to the *"interim" standards* . . . . With respect to the review responsibility of the Secretary of HEW under the legislation, the *"interim" standards* remain solely applicable, as

> they have in the past under the HEW-part of the program. As for the Secretary of Labor's review responsibility thereunder, the *"interim" standards are exclusively and unalterably applicable with respect to every area they now address*, and may not be made or applied more restrictively than they were in the past. . . .

124 Cong. Rec. 3426 (1978) (emphasis added). These views are entitled to particular respect because Representative Perkins, the senior House member of the conference committee and the floor manager when the bill returned to the House after conference, was the sponsor of the language ultimately enacted as Section 402(f)(2). H. R. 4544, 95th Cong., 1st Sess. (1977). *See North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 526-27 (1982).

Representative Simon stated in the same floor debate that, with respect to the claims subject to the provision that became Section 402(f)(2), the Secretary of Labor could "not prescribe *criteria* more restrictive than the social security interim adjudicatory *standards*." 124 Cong. Rec. 3431 (1978) (emphasis added). Similarly, Representative Murphy stated that such claims "will be reviewed in light of all available medical evidence, under *standards* no more restrictive than the 'interim' *standards* issued by the Secretary of Health, Education and Welfare." *Id.* at 3900 (emphasis added). Representative Erlenborn was the leading congressional opponent of reform legislation favorable to black lung claimants. In debates on H.R. 10760, 94th Cong., 1st Sess. (1975), Section 7 of which contained a provision like the one that became Section 402(f)(2), Representative Erlenborn stated:

> Already, the General Accounting Office, in looking over the *criteria* used under Part B, said that the Social Security Administration is using *criteria* more generous and more liberal than the law allows, and this bill would take those *criteria* and establish them as the *criteria* for part C. . . ."

122 Cong. Rec. 4972 (1976) (emphasis added).

The legislative history offers numerous other statements in the same vein, including the statement in the conference com-

mittee's report that DOL must promulgate interim regulations which "shall not provide more restrictive *criteria* than those applicable to a claim [under the HEW interim presumption]." H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978) (emphasis added).[29] In their number and in the diversity and the authority of the speakers, these statements reinforce the black lung claimants' interpretation that the "criteria" encompassed by Section 402(f)(2) are all the criteria that in combination establish "total disability."

b. The References To "Medical Criteria" And The Like, On Which The Secretary And The Private Petitioners Rely, Actually Support The Claimants' Interpretation

The Secretary's and the private petitioners' reliance on references in the legislative history to "medical criteria" and the like

[29] *See, e.g., 1977 Benefits Provisions Hearings*, p. 7 *supra* at 165 (remarks of Rep. Perkins stating "[t]he coal operators . . . are objecting to the interim standards that are now applicable to Part B being applied to Part C"); *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 142 (1977) (testimony in which Asst. DOL Secretary Elisburg stated "[t]here is some difficulty, however, with the idea of simply adopting the interim standards for part C"); *id.* at 49 (testimony of Arnold Miller, President, United Mine Workers, stating "H.R. 4544, the black lung bill recently reported from the House Education and Labor Committee, provided that the standards for judging claims of miners who filed after June 30, 1973 should be no more restrictive than the standards used to evaluate the claim of a miner who applied on June 30, 1973"); *id.* at 28 (identical testimony of Bedford Bird, M.D., United Mine Workers official); *1974 Hearings*, n. 27 *supra* at 340 (statement of William Worthington, Chairman, Regional Black Lung Association, Coxton, Ky., stating "[s]tandards for miners who filed claims after July 1, 1973 should be no more restrictive than those in force prior to July 1, 1973"); *id.* at 366 (testimony of John Rosenberg, Director Appalachian Research and Defense Fund, stating "[u]nless the Department [of Labor] is instructed to adopt more liberal standards, the interim standards at a minimum, we will return to the early days . . . when in Kentucky, for example, two-thirds of the claims were rejected").

is misplaced. In fact, the references support the black lung claimants' interpretation of Section 402(f)(2).

i. The Secretary contends that the word "criteria" in Section 402(f)(2) is "shorthand" for the phrase "criteria for all appropriate medical *tests*" in Section 402(f)(1)(D). Secy. Br. at 15, 22. If the legislative history did contain references suggesting that the word "criteria" in Section 402(f)(2) means "medical tests," they would offer some support for that contention. But the references in the legislative history to "medical *criteria*," "medical *standards*," and "medical *eligibility regulations*" do not offer such support because these categories are broader than "medical *tests*." In the black lung regulatory context, "medical tests" is a category that includes x-rays, ventilatory studies, and blood gas studies, whereas the broader categories of "medical criteria" and the like include not only these medical tests but also such other criteria as proof of disease causation (*see* pp. 37-39, *infra*) and proof of disability causation.[30]

[30] The Secretary cites isolated comments by three witnesses (a practicing attorney, an official of the United Mine Workers, and a minor official of the Department of Labor) to the effect that the differing ventilatory standards is the only respect in which the HEW interim presumption is more favorable to claimants than the HEW permanent regulations. Secy. Br. at 19-20. These comments do not help the Secretary. If Congress had considered these comments significant, the words "ventilatory study standards" would now appear in Section 402(f)(2) instead of the word "criteria." In any event, the HEW interim presumption is also more favorable to claimants than the HEW permanent regulations in respects other than the ventilatory study standards. Indeed, the claimants in this case, who do not rely on ventilatory studies at all, have litigated their claims so extensively precisely because *they* would be treated more favorably under the interim presumption than under the permanent regulations. Their x-ray evidence is sufficient to prove that they have pneumoconiosis, and they are also able to prove that their pneumoconiosis arose out of coal mine employment. Under the HEW interim presumption, they would automatically obtain a presumption that they are "totally disabled" without having to present any ventilatory studies or other evidence concerning the severity of their

ii. The private petitioners contend that the "criteria" to which Section 402(f)(2) refers are "the medical bases for invocation [of the HEW interim presumption]." Priv. Br. at 22. The words of the statute provide no support for this interpretation. Indeed, the private petitioners do not seriously contend otherwise. *See* Priv. Br. at 21-22 and n. 31. Consequently, they (and the Secretary, to the extent her shifting formulations include a similar interpretation, *see* n. 18 *supra*) rely heavily on the isolated references in the legislative history to "medical criteria" and the like. The private petitioners and the Secretary argue first that these references establish that the statutory directive requiring that "criteria . . . not be more restrictive" than the criteria in the HEW interim presumption applies only to "medical" criteria, as distinguished from "evidentiary" or "adjudicatory" criteria. Secy. Br. at 17-22; Priv. Br. at 22-27. They then classify the respect in which the DOL interim presumption is more restrictive than the HEW interim presumption as involving an "evidentiary/adjudicatory" criterion, not a "medical" criterion. *Id.* Both parts of this argument are wrong.

The terms "medical criteria" and the like are terms-of-art. The statements in the legislative history on which the Secretary and the private petitioners rely do not support the contention that the "criteria" to which Section 402(f)(2) refers are medical criteria only. The legislators and others used the words "medical criteria" and similar expressions as terms-of-art to mean all criteria necessary to establish eligibility, a meaning that supports the black lung claimants' interpretation of the statute.

The way in which the legislators and others used the terms "medical criteria" and the like in the legislative history stems from a basic dichotomy in the 20 C.F.R. Part 410 regulations.

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impairments. § 410.490(b). In contrast, under the HEW permanent regulations every claimant is required to prove affirmatively that he is "totally disabled" by presenting evidence (*e.g.*, blood gas studies or ventilatory studies) meeting rigorous standards. §§ 410.422-410.426.

These regulations governed both the Part B and Part C programs prior to the 1978 amendments, and they include the HEW interim presumption at § 410.490. Only subpart D of these regulations governed the determination of eligibility. While the regulations included in subpart D primarily relate to medical criteria, they also include non-medical criteria. *Compare* §§ 410.426(b), 410.430 (medical tests) *and* §§ 410.416, 410.418 (proof of disease causation and disability causation) *with* § 410.426(d) (vocational criteria); *compare also* § 410.422 (entitled "Determining total disability: General criteria") *with* § 410.424 (entitled "Determining total disability: Medical criteria only") *and* § 410.426 (entitled "Determining total disability: Age, education and work experience criteria"). In contrast, the remaining subparts of Part 410 set forth regulations that are not eligibility provisions at all. Rather, they are regulations that govern the processing of claims, including such matters as the duration of benefits for claimants already determined eligible, §§ 410.200-410.216, and the filing of claims. §§ 410.220-410-.223.

The structure of the Part 410 regulations is therefore one in which there is a clear distinction between the eligibility regulations of subpart D, on the one hand, and the processing regulations of the remaining subparts, on the other. The eligibility regulations include principally, though not exclusively, medical criteria, whereas the processing regulations include no medical criteria at all. In this context, it is understandable that the subpart D regulations came to be called the "medical eligibility" regulations notwithstanding the fact that some of the eligibility criteria they include are non-medical.

The committee report on S. 1538, the Senate bill that went to the conference committee, illustrates this point. The report stated that a particular section of the bill:

> does not require nor preclude the blanket incorporation of *any provision* now a part of the existing HEW *medical eligibility regulations (subpart D, 20 C.F.R. Part 410).*

S. Rep. No. 209, 95th Cong., 1st Sess. 14 (1977) (emphasis added). The Senate committee thus set forth its understanding

that the phrase "HEW medical eligibility regulations" refers to the entirety of the regulations codified at subpart D of Part 410, not merely to the particular provisions of subpart D setting out strictly medical criteria.

The Solicitor of Labor used the term "medical regulations" in the same way in a 1974 letter to the General Counsel of HEW. There the Solicitor requested HEW to amend the regulations at subpart D of the Part 410 regulations to insert a provision authorizing the Department of Labor to apply the entirety of HEW's interim presumption to Part C claims, concluding:

> It is our firm belief that the only appropriate way to remedy the existing difficulty is for Social Security to amend its *medical regulations* to permit the use of the interim criteria in Department of Labor cases.

DOL Solicitor Letter, n. 9 *supra* at 19 (emphasis added). Accordingly, the term "medical regulations" in the quoted passage referred to all the criteria, not merely the provisions setting out medical tests and other strictly medical criteria.

This usage of the terms "medical criteria" and the like to refer to more than strictly medical criteria under the black lung program has persisted. The Part 727 regulations incorporate the same eligibility/processing dichotomy as do the Part 410 regulations.[31] When the then Secretary of Labor adopted the Part 727 regulations in 1978, he stated:

> [T]he *procedures* contained in Part 725 of this subchapter and not those contained in this part [Part 727] are applicable to the *processing* of [certain] claims. Only the *medical*

[31] The titles of the subparts of Part 727 illustrate the point. *Compare* subpart C ("Criteria for Determining Eligibility for Benefits") *with* subpart A ("General"), subpart B ("Initial Review of Pending and Denied Claims"), subpart D ("Payment of Benefits/Liability"), *and* subpart E ("Special Review Provisions Relating to Claims Pending Before an Administrative Law Judge or the Benefits Review Board").

> *criteria* for determining eligibility with respect to such claims are contained in this part.

43 Fed. Reg. 36825 (1978) (emphasis added). The Secretary used the term "medical criteria" to refer to all the eligibility provisions codified at subpart C of Part 727, including provisions that contain purely medical criteria as well as provisions that contain non-medical criteria.[32]

In sum, such terms as "medical criteria," "medical standards," and "medical eligibility regulations," when used in the legislative history, were terms-of-art. They do not mean what the Secretary and the private petitioners say they mean. Rather, the statements using these terms refer to regulations setting out *all* the criteria necessary to determine a claimant's eligibility, including medical tests, other medical criteria, and non-medical criteria. Consequently, the references, far from providing support for the Secretary's and the private petitioners' interpretation of the statute, support claimants' interpretation instead.

Disease causation is a medical criterion. Even if the references in the legislative history to "medical criteria" and the like were not terms-of-art, but could be read narrowly to include only criteria that are strictly medical, that would not help the

[32] In administering the Title II and Title XVI social security disability programs, the Secretary of Health and Human Services has adopted a similarly expansive use of the term "medical" to refer to all eligibility criteria proving disability, including criteria other than ones that are strictly medical. In recent amendments to the regulations governing the adjudication of social security disability cases, HHS responded to certain comments, stating:

> [F]or purposes of the disability hearing process, we intend *"medical" issues to include* issues which the DDS is empowered to decide under existing regulations, *including "medical considerations" and "vocational considerations."* This same inclusive definition of the term "medical" has been used in Subparts J and N of Parts 404 and 416, respectively, for a number of years. . . .

51 Fed. Reg. 293 (1986) (emphasis added).

Secretary and the private petitioners here. As discussed in § A *supra*, the DOL interim presumption is more restrictive than the HEW interim presumption because, under the DOL version, miners able to prove that they have pneumoconiosis (by x-ray, biopsy, or autopsy evidence) are not allowed to trigger a presumption of total disability by proving that their pneumoconiosis arose out of coal mine employment (i.e., by proving disease causation). The Secretary and the private petitioners label this restrictive criterion an "evidentiary" and/or "adjudicatory" rule. Secy. Br. at 19, 24, 27; Priv. Br. at 22. But such labels cannot be permitted to alter what our common experience and the ordinary meaning of words tell us: the restrictive criterion here—proof of disease causation—is a "medical criterion."[33]

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[33] The private petitioners acknowledge that it is arguable that "'disease causation' is a medical criterion, at least in common parlance." Priv. Br. at 27 n. 36. However, they couple this concession with attempts to evade its consequences. They invoke *Strike* as support for their conclusion that "disease causation is not, in this context, a medical criterion." *Id.* But the *Strike* court reached its conclusion to this effect because it accepted the position that the word "criteria" refers to the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D). *See Strike*, 817 F.2d at 401. Thus, to the *Strike* court "disease causation" is not a "medical criterion" because it is not a "medical test." *See id.* at 405. However, this conclusion is wrong because, for the reasons discussed on pp. 22-26 *supra*, the *Strike* court erred by accepting the position that the word "criteria" refers to the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D). The private petitioners also say that "'disease causation' in the statute is treated entirely apart from 'disability causation' or total disability." Priv. Br. at 27 n. 36. Even if the statute did treat "disease causation" separately, this would not support the conclusion that "disease causation" is not a "medical criterion." In any case, as explained on pp. 19-20 *supra*, the statute, including the HEW interim presumption as incorporated by Section 402(f)(2), treats these issues as one. Finally, the private petitioners fall back on the deference supposedly owed the Secretary's construction of the statute. Priv. Br. at 27 n. 36. However, as explained in § D *infra*, the Secretary's construction of the statute in this case is not entitled to any deference.

When we feel sick we go to a physician to determine the types of medical conditions that afflict us, and the physician normally must try to determine "disease causation" in order properly to treat the conditions that are diagnosed. Indeed, physicians or other medical professionals are ordinarily the only persons qualified to make these determinations. That is why in personal injury cases plaintiffs must usually introduce a "medical" expert on questions of disease causation. *See, e.g., Hegger* v. *Green*, 646 F.2d 22, 28-29 (2d Cir. 1981).[34] Thus, even if Section 402(f)(2) applies only to medical criteria, the DOL interim presumption fails to comply with the Section's mandate because the respect in which the DOL presumption is more restrictive than the HEW presumption—proof of disease causation—is a medical criterion.

3. The Legislative History Contradicts The Secretary's View That Congress Did Not Wish To Preserve The Ability Of Miners Who Worked Less Than Ten Years In The Mines To Trigger A Presumption Of "Total Disability"

Although the HEW interim presumption enabled miners with less than ten years mining experience to trigger the presumption of disability, the Secretary reads the legislative history to reflect a congressional intention in Section 402(f)(2) *not* "to preserve . . . [that] ability." Secy. Br. at 23. To support this reading, she says that evidence presented before enactment of the 1978 amendments persuaded Congress that miners with less than ten years mining experience rarely contract black lung disease. *Id.* at 23-24.

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[34] What our common and professional experiences tell us, the medical literature on pneumoconiosis confirms. Medical pneumoconiosis has dozens of possible causes. In addition to the inhalation of coal dust, various silicates and metals cause the disease; and only a physician is qualified to determine what the causative agent is. *Cecil Textbook of Medicine* 406-19 (J. Wyngaarden, M.D. & L. Smith, Jr., M.D. 17th ed. 1985).

The Secretary's reading of the legislative history is profoundly flawed. First, the only evidence on which she relies, the report of consultant James Weeks attached to H.R. Rep. No. 151, 95th Cong., 1st Sess. 30-38 (1977), contradicts her position. Citing studies that did show significant x-ray evidence of pneumoconiosis in miners who worked less than ten years in the mines (*e.g.*, *id.* at 36 fig. 4), Weeks suggested that the prevalence of pneumoconiosis was nevertheless underreported because of the inadequacies of x-rays in detecting the disease. *Id.* at 31-32. Weeks considered "more reliable," *id.* at 31, an autopsy study that found pneumoconiosis in greater than sixty percent of the miners who worked less than ten years in the mines. *Id.* at 34 (bar graph).

Second, if Congress believed that miners with less than ten years experience rarely contract black lung disease, it certainly would have considered barring them from eligibility entirely. But the legislative history contains not a hint that Congress ever entertained such an idea. And the Secretary's own permanent regulations, proposed simultaneously with the interim presumption, 43 Fed. Reg. 17732 (1978), and adopted thereafter, 45 Fed. Reg. 13678, 14846 (1980), *do* allow such miners to recover benefits, § 718.203(c), just as HEW's permanent regulations had. §§ 410.416(b), 410.456(b).

Third, the prevalence of pneumoconiosis in miners who worked less than ten years in the mines is irrelevant in any event. A claimant cannot obtain benefits under the HEW interim presumption unless he proves that he does in fact have pneumoconiosis, § 410.490(b)(1)(i), and that it arose out of coal mine employment. § 410.490(b)(2) (incorporating §§ 410.416 and 410.456). The legislative history contains no suggestion that Congress would have wanted to deprive those with less than ten years experience who *do* have pneumoconiosis of the availability of the interim presumption even if it were true that many, or even most, other miners who worked less than ten years do not have the disease.

Finally, in support of her position, the Secretary states that DOL incorporated the ten-year statutory presumption at Section 411(c)(1) of the Act, 30 U.S.C. § 921(c)(1), into the DOL interim presumption. Secy. Br. at 23. But the function of the Section 411(c)(1) presumption is not to determine who has pneumoconiosis and who does not. Indeed, it expressly applies only to those who have already proven that they do in fact have pneumoconiosis. Rather, Section 411(c)(1) was designed to help claimants who are unable to prove that their pneumoconiosis arose out of coal mine employment by presuming that fact if they can prove that they worked in the mines for at least ten years. The DOL interim presumption is therefore anomolous. By incorporating the Section 411(c)(1) presumption, the DOL interim regulation provides a presumption of eligibility for many claimants who *are unable to prove* that their pneumoconiosis arose out of coal mine employment. But it fails to provide any assistance whatever for other claimants who *are able to prove* that their pneumoconiosis arose out of coal mine employment.

D. The Secretary's Latest Interpretation Of Section 402(f)(2) Is Not Entitled To Deference

Both the Secretary and the private petitioners vigorously press the contention that this Court should defer to the Secretary's current construction of the statute. Secy. Br. at 27-28; Priv. Br. at 28-30. But no such deference is owing here.

1. The interpretation of Section 402(f)(2) that the Secretary now advances is inconsistent with the construction she made contemporaneously with the statute's enactment. Following enactment of the 1978 amendments, the Secretary promulgated the regulations at 20 C.F.R. Part 727. 43 Fed. Reg. 36818-31 (1978). Section 727.200 of those regulations, entitled "Basis for *criteria*," provided:

> In enacting the Black Lung Benefits Reform Act of 1977, Congress provided that the *criteria for determining whether a miner is or was totally disabled or died due to pneumoconiosis* shall be no more restrictive than the criteria applicable to a claim filed with the Social Security

> Administration on or before June 30, 1973, under Part B of Title IV of the Act (the interim adjudicatory rules).

§ 727.200 (emphasis added). The import of this provision, the Secretary's contemporaneous construction of Section 402(f)(2) of the Act, could hardly be clearer: the word "criteria" in Section 402(f)(2) of the Act refers, as the black lung claimants contend, to the set of all "criteria for determining [total disability]" in the HEW interim presumption, not just to medical criteria or some other limited set of criteria. *See also* § 718.1(b).[35]

Even though the Secretary properly construed Section 402(f)(2) in § 727.200 of the Department's regulations, the DOL interim presumption at § 727.203 failed to honor this construction. *See* § A *supra*. The inconsistency between § 727.200 (the DOL's regulatory *construction* of the statute) and § 727.203 (the regulatory *implementation* of the statute) was an unintentional oversight according to Mark E. Solomons, the "principal author" of the Part 727 regulations. 43 Fed. Reg. 17766 (1978).[36]

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[35] The then Secretary of Labor presaged this construction when, immediately after Congress passed the 1978 amendments, he urged the President to sign the bill:

> [W]e were opposed to provisions making the use of the "interim standards" mandatory for the determination of total disability under Part C . . . . While we still believe the "interim standards" are inappropriate, the limitation of their use to reviewed and pending claims in conjunction with the requirement that all other relevant evidence be considered reduces our concerns substantially.

Report on H.R. 4544 from Secy. Marshall to James McIntyre, Director, Office of Management and Budget (Feb. 28, 1978), *quoted in* Solomons, n. 9 *supra* at 895 (full text unavailable).

[36] Mr. Solomons made this clear when, as private counsel, he filed briefs in the *Halon* and *Kyle* cases. In those briefs he stated that, until the Benefits Review Board's 1981 decision in *Lynn* v. *Director, O.W.C.P.*, 3 Black Lung Rep. 1-125 (Ben. Rev. Bd. 1981), in which Judge Miller pointed out that the HEW interim presumption does indeed advantage claimants in a manner that the Labor presumption does not, *id.* at 128-35 (dissenting opinion), no one was even aware of

Given the extreme complexity of the black lung statutory and regulatory scheme, the failure of even DOL officials to recognize the restrictive aspect of the DOL presumption is not surprising.[37] What is surprising is the Department's inaction

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that fact. Joint Brief Amicus Curiae on Behalf of the National Association of Independent Insurers and the National Coal Association at 23, 29, *Halon II* (No. 82-3066); Brief Amici Curiae of Old Republic Insurance Co., Pittston Coal Group and Island Creek Coal Co. in Support of the Respondent's Motion for Rehearing at 1 n.1, *Kyle* (No. 85-3535) (citing incorrectly to *Halon*, which came after *Lynn*).

In 1981, Mr. Solomons wrote an article on the interim presumption, which was based in part on his participation in the drafting on both the 1978 amendments to the Act and the DOL interim presumption. Solomons, n. 9 *supra* at 869 n.*. Numerous statements in the article make apparent his view that Congress intended to give claimants subject to Section 402(f)(2) no less than the full benefit of the HEW interim presumption. *E.g.*, *id.* at 874, 892, 893, 895. There is no hint of a contrary view.

[37] The Secretary and the private petitioners point out that after enactment of the 1978 amendments, the members of the House Committee who reviewed the DOL presumption before its promulgation did not suggest that it was inconsistent with Section 402(f)(2). Secy. Br. at 24-25; Priv. Br. at 25-26. However, if no one was even aware that the HEW presumption advantages claimants in a manner that the DOL presumption does not, these legislators would never have had occasion to consider whether, due to this disparity, the DOL presumption is inconsistent with Section 402(f)(2).

The private petitioners also rely on a subcommittee's failure to find fault with the DOL presumption after it conducted oversight hearings relating to the black lung program in 1981. Priv. Br. at 30. However, in contrast to what the private petitioners suggest, the hearings did not entail a "comprehensive review of eligibility standards," *id.*, but concentrated instead on the financial condition of the trust fund. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. *passim* (1981). Moreover, Judge Miller did not issue his dissenting opinion in *Lynn* until May 1981, only a few months before the subcom-

after Judge Miller's dissenting opinion in *Lynn*, 3 Black Lung Rep. at 128-35. *See* n. 36 *supra*. Faced with a clear inconsistency between § 727.200's construction of Section 402(f)(2) of the Act and § 727.203's implementation of the same statutory provision, DOL could have amended its regulations to resolve that inconsistency. But the Department did not do so then and has not done so yet, though more than seven years have passed since Judge Miller revealed the inconsistency. Instead, the Secretary has intensified the inconsistency by advancing successive inconsistent positions in litigation.

The Secretary set forth the first of the Department's litigation interpretations in the brief on the merits in *Halon I*. That interpretation made no distinction between medical and nonmedical criteria. Rather, the Secretary, focusing solely on the "not . . . more restrictive" phrase in Section 402(f)(2), read the Section to allow the Department to apply standards that are less favorable than the HEW interim presumption to some claimants as long as they are more favorable than the HEW interim presumption to at least the same number of claimants. Brief of the Respondent, Director, O.W.C.P. at 17-19, *Halon I* (No. 82-3066). The Secretary has abandoned this interpretation entirely.

In his petition for rehearing in *Halon I*, the Secretary shifted to an entirely different interpretation of Section 402(f)(2), contending that the word "criteria" in the Section encompasses only "medical criteria." Petition for Rehearing on Behalf of the Director, O.W.C.P. at 2, 6-13, *Halon I* (No. 82-3066). That interpretation is the same as one of the formulations the Secretary advances to this Court. *See* n. 18 *supra*. But in neither the petition to rehear *Halon I* nor the subsequent petition to rehear *Halon II en banc* did the Secretary present the primary formulation she proffers here, that the

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mittee concluded its hearings. There is no indication that the DOL, after learning that the DOL presumption is more restrictive than the HEW presumption, informed the subcommittee of that fact.

word "criteria" in Section 402(f)(2) is "shorthand" for the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D). Secy. Br. at 15, 22.

2. The clarity of the statutory language, the support the legislative history lends claimants' interpretation of Section 402(f)(2), the Secretary's obligation to give the benefit of any doubt to claimants when construing the Act, and the history of the Secretary's varying and inconsistent interpretations of that provision make deference to her latest interpretation inappropriate.

a. Deference to an administrative agency's construction of a statute is not appropriate unless a court, "employing traditional tools of statutory construction," determines that the statute is "silent or ambiguous." *Chevron U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 and n. 9 (1984). However, for the reasons discussed in §§ B and C *supra*, the statute here is neither silent nor ambiguous with respect to the "criteria" to which Congress was referring in Section 402(f)(2).

b. Even if the statute here were silent or ambiguous, the Secretary's proffered interpretation would not be entitled to deference.

i. The Secretary claims that her position is entitled to deference because it is a "reasonable," or at least a "permissible," interpretation of the language of the statute. Secy. Br. at 14, 28. Although agency constructions are normally entitled to deference even if they are merely permissible ones, *Chevron U.S.A.*, 467 U.S. at 843-44, the legislative history of the 1978 amendments make the situation here special. For the committee report accompanying the bill that the Senate passed and sent to conference expressed the expectation that in interpreting the 1978 amendments, the Secretary of Labor would "give the benefit of any doubt to the coal miner." S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977). The DOL, by regulation, has bound itself to comply with this congressional directive. § 718.3(c). But the Secretary violates that obligation here. Where more than one interpretation of the statute is possible,

the Secretary's assumed obligation to follow the directive requires her to adopt an interpretation that is favorable to claimants if it is reasonable. The black lung claimants' interpretation of Section 402(f)(2) is at least a reasonable one. Therefore, the Secretary should have adopted it.

ii. Nothing in the DOL's administrative record concerning Section 402(f)(2) discloses or explains the latest interpretation of the Section that the Secretary advances here. This also makes deference to her interpretation inappropriate. *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 n. 5 (1978). In her capacity as a party before this Court, the Secretary acknowledges that the HEW interim presumption does favor claimants in a way the Labor presumption does not. However, neither the Department's regulations nor the comments accompanying them even mention that this disparity exists, much less disclose the Department's current view that the disparity is legal, provide the reasons for this view, or disclose that the Department does not follow the construction of Section 402(f)(2) that it published at § 727.200. 43 Fed. Reg. 36824-26 (1978). The interpretation of Section 402(f)(2) that the Secretary offers here, and the reasons for it, are nothing more than "appellate counsel's post hoc rationalizations for agency action" that "the courts may not accept." *Motor Vehicle Mfrs. Assoc'n* v. *State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983).

iii. Deference is more readily accorded an agency's construction if that construction was contemporaneous with the enactment of the statute being construed and if the construction has been a consistent one. *NLRB* v. *United Food and Commercial Workers*, 108 S. Ct. 413, 421 n. 20 (1987). However, as explained at pp. 41-44 *supra*, the Secretary's current interpretation is neither contemporaneous nor consistent.

E. A Court May Direct The Secretary Of Labor To Apply The HEW Interim Presumption Because It Has Statutory Force And Effect

The private petitioners argue that even if the DOL interim presumption does not properly implement Section 402(f)(2), a

court cannot simply order the Secretary to apply the HEW interim presumption to the claims subject to the Section. Priv. Br. at 20 n. 30. Such an order, they contend, would violate the requirement that only the Secretary of Labor, not the courts, can issue regulations governing Part C claims, and then only after she complies with the requirements for rulemaking set out in the APA at 5 U.S.C. § 553. Priv. Br. at 20 n. 30 (*citing* 30 U.S.C. §§ 902(f)(1), 936(a)). According to the private petitioners, ordering the Secretary to apply the HEW interim presumption would violate these requirements because DOL did not choose to issue that presumption as a regulation. *Id.* They conclude that the proper course would be to remand the case to the Department for rulemaking. *Id.*

The argument is fallacious because it fails to recognize that with respect to the claims subject to Section 402(f)(2), the HEW interim presumption is not a "rule" at all. Congress incorporated the presumption in Section 402(f)(2) of the Act. By virtue of this incorporation, the presumption gained the force and effect of a statute and therefore is not subject to the rulemaking provisions of the APA. 5 U.S.C. §§ 551(1)(A), 551(4).

Consequently, in directing the Secretary to apply the HEW interim presumption to the claims subject to Section 402(f)(2), the courts of appeals did not, as the private petitioners suggest, usurp the Secretary's "authority to write an agency rule." Priv. Br. at 20 n. 30. Rather, they did what courts are supposed to do: they "interpret[ed] and *appl[ied]* statutory law." *Northwest Airlines* v. *Transport Workers*, 451 U.S. 77, 95 n. 34 (1981) (emphasis added). The private petitioners' position thus reduces itself to the remarkable contention that the courts lack the authority to instruct the Secretary to apply Congress' express statutory commands.[38]

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[38] Although the Secretary has not joined in this argument, the Benefits Review Board recently held that the Secretary could not apply the HEW interim presumption because she had not promul-

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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gated it as a regulation in accordance with the Black Lung Benefits Act and the APA. *Whiteman* v. *Boyle Land and Fuel Co.*, 11 Black Lung Rep. 1-99 (Ben. Rev. Bd. 1988) (*en banc*). Moreover, the Board extended the holding even to claims governed by the law of the circuits that decided *Halon*, *Coughlan*, *Kyle*, and *Broyles* because those courts did not address the issue. *Id.* Thus, the Board's decision in *Whiteman* forbids the Secretary from complying with these circuit court decisions unless she issues a regulation duly promulgated in accordance with the rulemaking requirements of the APA. The Secretary, however, has neither issued nor proposed any such regulation. If this Court determines that the claims subject to Section 402(f)(2) of the Act are entitled to the benefit of the more favorable invocation criterion included in the HEW interim presumption, it should ensure that compliance will be prompt by expressly rejecting the argument that the Secretary must first promulgate a regulation to bring about that result.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1988

PITTSTON COAL GROUP, *et al.*,

v. *Petitioners,*

JAMES SEBBEN, *et al.*,

Respondents.

ANN MCLAUGHLIN, Secretary, United States Department of Labor, *et al.*,

v. *Petitioners,*

JAMES SEBBEN, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

v. *Petitioners,*

CHARLIE BROYLES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FOURTH CIRCUITS

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IN THE

Supreme Court of the United States

OCTOBER TERM 1988

Nos. 87-821, 87-827 and 87-1095

PITTSTON COAL GROUP, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

ANN MCLAUGHLIN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Petitioners,

v.

CHARLIE BROYLES, *et al.*,

Respondents.

REPLY BRIEF FOR THE PITTSTON COAL GROUP AND CO-PETITIONERS

INTRODUCTION

This case presents several issues of great importance. Central to the resolution of these issues is whether the Secretary of Labor violated the clear mandate of section 402(f)(2) of the Black Lung Benefits Act (the "Act"), 30 U.S.C. § 902(f)(2), by promulgating an "interim presumption" that requires at least ten

years of coal mine employment for its invocation on the basis of positive chest x-ray, biopsy, or autopsy evidence of pneumoconiosis, and that permits rebuttal based on medical evidence disproving presumed facts. 20 C.F.R. § 727.203 (1988).

The Fourth Circuit's opinion below holds that the ten year requirement and rebuttal format of the Labor rule violate section 902(f)(2). To remedy this perceived violation, the Eighth Circuit's opinion below requires the Secretary of Labor to reopen at least 94,000 previously adjudicated and denied claims, and relitigate them under 20 C.F.R. § 410.490 (1988), the Social Security Administration's ("SSA") version of the interim presumption.

Pittston and co-petitioners ("Pittston"), and the Secretary of Labor ("Secretary") seek reversal in both cases. Pittston argues that neither the Act nor its contemporary legislative history required the Secretary of Labor to publish an exact replica of the SSA rule. Instead, Congress intended and expected that Labor would promulgate a regulation that preserved the medical guidelines of the SSA rule and that properly suited the adversarial litigation of the Labor Department program. Pittston also contends that section 410.490 violates the Act in several ways and cannot be sustained under due process scrutiny. Further, the Eighth Circuit's reopening of closed cases is jurisdictionally barred by the Longshore Act, 33 U.S.C. §§ 901-952, and is otherwise prohibited by the rule of res judicata.

The Secretary claims judicial deference for the Labor Department rule, noting that the language and intent of the Act bound the Secretary to apply only the SSA medical guidelines and not section 410.490's internal evidentiary rules. Thus, it was permissible for Labor to condition operation of its presumption upon proof of ten years of coal mine employment, and to provide for rebuttal when the evidence disproves presumed facts. The Secretary and Pittston also rely upon post-enactment congressional ratification of the Labor rule. Responding to the Eighth Circuit's mandate, the Secretary relies upon the traditional rules limiting mandamus powers and upon principles of res judicata to demonstrate error in the Eighth Circuit's rejuvenation of previously denied and closed cases.

The *Sebben* plaintiffs and *Broyles* claimants have filed separate responding briefs. Both argue that Labor's rule is not entitled to judicial deference because it violates the plain language of 30 U.S.C. § 902(f)(2), and because the Secretary's proffered justification for her rule is merely a post hoc rationalization by appellate counsel. Sebben's Brief at 17-21, 36; Broyles' Brief at 14-21, 41. Both responding briefs concede, however, that the word "criteria" in 30 U.S.C. § 902(f)(2) means invocation, but not rebuttal, criteria. Sebben's Brief at 35; Broyles' Brief at 18 n.20.[1] Sebben argues that the addition of 30 U.S.C. § 945 to the Act in 1978 created an automatic "collateral right" to consideration under section 410.490 that has not been afforded to the class of claimants described in the Eighth Circuit's decision below. Sebben concludes that 28 U.S.C. § 1361 is available to remedy the Secretary's failure to honor her "clear duty" to review these claims under section 410.490. Sebben's Brief at 40-43.

Trade associations representing the workers' compensation insurance industry and the coal industry filed briefs amici curiae in support of reversal. The insurers contend that they wrote no policies for liabilities arising under section 410.490, were not asked to do so, and would not have done so. Insurance Industry Brief at 11, 18. The coal industry, which would be economically devastated far into the future by affirmance of the decisions below, highlights the advanced age of the affected claims, the Department of Labor's limited ability to defend claims paid by

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[1] Respondents' concession should not preclude the Court's consideration of this critical question. The Fourth Circuit held that section 410.490's rebuttal standards apply, and was obviously unable to reach the conclusion readily embraced by respondents that the word "criteria" in section 902(f)(2) refers only to "invocation criteria." *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987). The Secretary speculates (with uncertainty) that the rebuttal question may be deflected on the theory that the SSA rebuttal provisions are not exhaustive and that Labor's rebuttal format may not be more restrictive than SSA's. Secretary's Brief at 26 n.21. This speculation affords no comfort to employers who would be required to litigate claims under section 410.490 if the decisions below are sustained. It is a fact that in the almost 600,000 claims adjudicated by SSA under section 410.490 there are no published decisions that either permit or even acknowledge the possibility of rebuttal on the basis of medical evidence.

the Trust Fund,[2] and the evidentiary hurdles adopted by the circuits in their rebuttal holdings under section 727.203. The mine owners argue that these circumstances preclude any semblance of fair treatment for them if the decisions below are sustained. Coal Association Brief at 10-11, 16-18.

I. NEITHER THE LANGUAGE OF THE ACT NOR ITS LEGISLATIVE HISTORY PRECLUDES THE SECRETARY'S INTERPRETATION OF THE TERM "CRITERIA" IN 30 U.S.C. § 902(f)(2)

From its origins in a 1972 Senate Report, the black lung "interim presumption" was to consist of a combination of "evidentiary rules" and "disability evaluation criteria." S. Rep. No. 743, 92d Cong., 2d Sess. 18, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305, 2322. The distinction between evidentiary rules and disability criteria was well understood by Congress when it first considered the liberalization of Labor's eligibility rules. From 1973 to the promulgation of an interim presumption by the Secretary of Labor in 1978, Department of Labor officials were involved in ongoing deliberations with Congress, SSA and interested constituent groups concerning the application of an interim presumption in Department of Labor black lung claims. *See Black Lung Amendments of 1973: Hearings on H.R. 3476, H.R. 8834, H.R. 8835, and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 329, 398-99 (1973-1974) (testimony of Nancy M. Snyder, U.S. Department of Labor). When the debate began, the participants understood that the critical elements of the presumption were the medical test criteria contained in the SSA rule. *Id.* at 75 (testimony of Stephen Kurzman, Department

[2] No mine operator may participate as a party in any claim that is payable by the Black Lung Disability Trust Fund. 30 U.S.C. § 934(b)(1). The Department of Labor has limited ability to defend claims and it is often precluded from challenging favorable x-ray evidence relied on by claimants. *Id.* § 923(b); Insurance Industry Brief at 9 n.9. This means, in effect, that for those miners with fewer than ten years of coal mine employment invocation of the section 410.490 presumption could be virtually automatic.

of Health, Education, and Welfare);[3] *id.* at 204 (testimony of Bruce Boyens, Legal Advisor, Black Lung Association);[4] *id.* at 340 (statement of William Worthington, Chairman, Regional Black Lung Association); *id.* at 353 (statement of Bedford W. Bird, United Mine Workers of America);[5] *id.* at 367, 398 (testimony of John Rosenberg, Director, Appalachian Research and Defense Fund);[6] *id.* at 398 (testimony of Nancy M. Snyder).[7]

In the years that followed, there was no further discussion in testimony, debate or committee proceedings concerning the duration of employment required to invoke the SSA presumption. On the other hand, the medical test guidelines in the SSA rule continued to generate controversy. *See* Pittston's Brief at 8-10 & nn.6-18.

When Congress finally directed Labor to apply certain "criteria" in the categories of claims designated in 30 U.S.C. § 902(f)(2), Labor understood that it was required to write a regulation incorporating SSA's medical test guidelines. Labor did not believe that it was required to include in its presumption other parts of the SSA rule. There is no compelling reason why the Secretary should have reached any different conclusion. In the

[3] Assistant Secretary Kurzman's discussion of the SSA presumption is entitled "INTERIM GUIDELINES ON MEDICAL TESTS."

[4] In discussing SSA's rules, Mr. Boyens testified: "It seems as though a miner who is employed less than 10 years, who can come up with the medical evidence . . . [is] denied his benefits simply because of the fact he worked less than 10 years, thereby getting no benefit of any presumption under the law."

[5] Mr. Bird testified: "[Section 410.490] provide[s] that a man who has worked 15 years in the mines may qualify for benefits if he has x-ray proof of pneumoconiosis, or if he can show by scores on a ventilatory test that he is disabled . . . . "

[6] Testifying in favor of extending the presumption to Labor claims, Mr. Rosenberg stated: "A miner with 10 or 15 years might be required to meet the interim standards, and a miner with less than 10 years, perhaps, a more rigid standard."

[7] Ms. Snyder informed the Committee Chair: "I want to make it clear that we are only talking about one standard. We are talking about the ventilatory. We are not talking about the broad array of standards that were passed in the 1972 amendments."

vast legislative history compiled prior to promulgation of Labor's rule there are no specific references demonstrating that the Secretary of Labor's judgment was erroneous. In fact, there appeared to be agreement that this very powerful presumption should be available only if some significant duration of exposure was established. *See supra* notes 3-7.

Section 902(f)(2) requires application of the SSA "criteria," not SSA's regulation. The Secretary argues that "criteria" means "medical" criteria and that "medical criteria" means the specific medical test guidelines specified in section 410.490. Sebben and Broyles argue that "criteria" means the "invocation" rules, but not the "rebuttal" rules contained in section 410.490. Sebben's Brief at 35; Broyles' Brief at 18-19. Petitioners' interpretation of "criteria" draws support from the language and structure of the Act;[8] respondent's position does not. Respondents' "plain language" analysis shatters on their concession that Congress clearly expected Labor to exclude the rebuttal limitations of the SSA regulation.[9]

The pre-enactment history expresses no specific expectation that the Secretary of Labor must permit invocation by a short-

[8] In addition to the factors previously noted (Secretary's Brief at 18; Pittston's Brief at 20-21), Congress's recognition that there would be significant differences between SSA and Labor rules is clearly reflected in the claim review provisions of 30 U.S.C. § 945(a). A previously denied SSA claimant had the option to elect review by either Labor or SSA. *Id.* § 945(a) (1). If SSA review was elected and SSA approved the claim under section 410.490, the claim was transferred to Labor to be treated in all other respects as if the claim was filed with the Labor Department in the first place, except that the SSA determination of entitlement was binding on Labor. *Id.* § 945(a)(2)(A). The SSA loop would have little meaning if Congress expected absolute parity in the two agency's adjudications. *See also* 124 Cong. Rec. 3431 (1978).

[9] Respondents' challenge to the Secretary's statutory analysis of the term "criteria" offers little more than speculation that the word means only invocation standards. Respondents' statutory analyses are no more compelling than the Secretary's and are probably less so if carefully scrutinized. The Secretary is charged with the responsibility for enforcement of the Act. To be sustained, the Secretary's interpretation need only be reasonable, it "need not be the best one by grammatical or any other standards." *EEOC* v. *Commercial Office Prod. Co.*, 108 S. Ct. 1666, 1671 (1988).

term miner. The Secretary states that the repeated references to "medical criteria" in the legislative history refer to section 410.490's medical guidelines only. Sebben and Broyles argue that the references to "criteria" or "standards," whether or not modified by the word "medical," broadly refer to all of section 410.490(b), and in any case, proof of ten years of employment is a "medical" criterion.[10] Both the petitioners' and the respondents' arguments are plausible, and no ultimate conclusion can be verified from the congressional pronouncements upon which each relies. All parties agree, however, that Congress mandated different presumptions. Sebben and Broyles argue that these differences may be reflected solely in rebuttal provisions;[11] that is only their preference but there is no clear proof that it was Congress's.

Post-enactment congressional activity is more illuminating. Courts may not ignore post-enactment expressions of intent and should accord them the weight they merit. *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535 (1982). Section 727.203 has been in existence for ten years without once drawing a word of congressional disapproval. During the same term of Congress in which 30 U.S.C. § 902(f)(2) was enacted, the rule was presented for approval to key House conferees. In formal public comment these members approved Labor's rule, with specific reference to the ten year requirement. Pet. App. 46a. The pre-enactment statements of these same members and the reports of the committees they chaired comprise approximately the entire legislative

[10] This latter prong of both responding arguments misses the point. Whether or not disease causation involves medical judgments when a person visits a physician, *see* Broyles' Brief at 39, section 410.490 contains no "criteria" for making such judgments. The Secretary of Labor was directed to apply "criteria" no more restrictive than criteria applied by SSA. The Secretary of Labor contemporaneously understood Congress's references to criteria to mean only the specific medical test guidelines adopted by SSA in section 410.490 for presuming the existence of compensable disability or death. SSA's rule contained no "medical criteria" for determining disease causation so there was nothing to adopt. *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 404-05 (7th Cir. 1987).

[11] "Disease causation" may be rebutted under section 727.203(b)(4) but not section 410.490(c). It is difficult to see how the issue can be a mandatory medical criterion for purposes of invocation but not rebuttal.

history of section 902(f)(2) in the House of Representatives. While post-enactment written approval is not the equivalent of action by the Congress as a whole, given the members involved and the circumstances here, it is tantamount to just that and is highly persuasive. *See Commodity Futures Trading Comm'n* v. *Schor*, 106 S. Ct. 3245, 3255 (1986).

Further, Congress reviewed the program in its entirety in 1980-1981 and requested reports from the Comptroller General examining in detail both Labor and SSA eligibility provisions. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong. 1st Sess. 2-15 (1981) (hereinafter *1981 Oversight Hearings*).[12] The Comptroller General's report to the Congress specifically quoted Labor's rule requiring at least ten years of coal mine employment for invocation of Labor's interim presumption. Comptroller General of the United States, *Report to the Congress of the United States: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* 11 (1982), *reprinted in 1981 Oversight Hearings, supra*, at 7. Allegations that Congress was unaware of the Secretary's ten year rule are not credible.

During the 1981 legislative process, neither Congress nor witnesses appearing before it criticized Labor's ten year rule. Congress concluded its deliberations by repealing several of the most significant benefit eligibility provisions enacted in 1972 and 1977, including three statutory presumptions available to long-term miners.[13] The interim presumption had aleady been repealed by regulation and required no congressional action.

[12] Broyles incorrectly states that the 1981 proceedings did not focus on medical eligibility rules. Broyles' Brief at 43 n.37. The amendments enacted in 1981 significantly revised statutory eligibility standards. Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, §§ 202, 203, 95 Stat. 1643, 1643. Many witnesses in addition to the Comptroller General testified concerning Labor's eligibility standards. *1981 Oversight Hearings, supra*, at 27, 80, 125, 139, 207-22, 229-39, 253-56.

[13] These presumptions cannot be applied in claims filed on or after January 1, 1982. 30 U.S.C. §§ 921(c)(2), (4), (5).

20 C.F.R. Part 718 (1988).[14] "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress'." *Schor*, 106 U.S. at 3255 (quoting *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 380-81 (1969)).

The legislative and statutory environment here is not unlike that in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The statutory terms and preenactment legislative history fail to provide definitive answers. With respect to the ten year rule, the authorities relied upon by respondents contain no specific answer to the precise question presented. The Secretary of Labor was required to formulate a rule that satisfied the demands of some members of Congress to increase the number of awards made and, at the same time, to preserve the rights of claim defendants and the economic and scientific integrity of the program.[15] The agency's choice controls unless it is irrational or clearly at odds with the intent of the law. *Chevron, U.S.A.*, 467 U.S. at 865-66; *see also K Mart Corp.* v. *Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988). The Secretary's rule reflects a reasonable accommodation in which Congress subsequently acquiesced and, as such, should be approved by this Court. *See Zemel* v. *Rusk*, 381 U.S. 1, 11-12 (1965).

II. THE SECRETARY'S TEN YEAR TRIGGER AND FULL REBUTTAL FORMAT MERIT JUDICIAL DEFERENCE

Broyles and Sebben insist that the ten year rule was adopted either by mistake or in a deliberate effort to violate congressional

[14] The Secretary of Labor was under no obligation to repeal the interim presumption if it proved scientifically valid. 30 U.S.C. § 902(f)(1).

[15] No case can be made to support the proposition that Congress was simply unconcerned with the economic impact of this program on the affected industries or that Congress intended the payment of benefits to miners regardless of the merits of their claims.

intent.[16] Sebben's Brief at 28, 38; Broyles' Brief at 42-44. Their position is erroneous for several reasons. In addition to the statutory language and legislative authorities cited, other factors support Labor's rule.

The Secretary's frequent involvement over many years with the congressional committees that drafted the Act and its amendments is one such factor. What is more significant from industry's perspective, however, is that neither Congress nor the Department of Labor had any scientific justification to make the interim presumption available to short-term miners. In opening briefs, petitioners note that pneumoconiosis is rare in miners with fewer than ten years of coal mine employment.[17] Secretary's Brief at 23-24; Pittston's Brief at 26 n.35. What is even more important is that the degree of "simple" pneumoconiosis found in the few short-term miners who contract the disease is too insignificant to cause impairment much less total disability. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). Because of the proof difficulties in rebutting Labor's presumption and its extraordinary power to require awards where pneumoconiosis played only a trivial role in a miner's disability, *see* Coal Association Brief at 10-11 & nn.26-30, it was not unreasonable for the Secretary of Labor to limit availability of the presumption to situations where

[16] Respondents' description of the ten year rule as a mistake followed by a cover-up is naive at best. From the beginning, the black lung program has been literally overrun by congressional watchdogs. Each year from 1969 to 1981 saw congressional hearing after congressional hearing, reports and investigations. There is no likelihood that Labor's ten year rule — a rule significantly affecting almost 100,000 claims — simply escaped this attention. The "ten year" issue arose in claims litigation as a result of the creativity of claimants' attorneys, and not because of any breakdown in communications between Congress and the Secretary. Broyles' contrary assertion twists the facts. *See* Broyles' Brief at 42 n.36.

[17] Section 727.203 applies with equal force to both underground and surface coal miners. The evidence before Congress demonstrated that persons who work exclusively in surface coal mining do not contract pneumoconiosis. On the assumption that a few surface miners "who have worked in extremely dusty situations . . . for long periods of time" might get the disease, surface miners were included in the coverage of the Act. S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972).

there was a rational connection between proven facts and presumed entitlement.

The Secretary of Labor did not preclude short-term miners from obtaining benefits, as asserted by Sebben, but only required them to prove occupationally related total disability. Given the science of the matter, Labor's approach is plainly reasonable.[18]

Sebben suggests that depriving short-term miners of the interim presumption defeats the purpose of the claim review provisions of 30 U.S.C. § 945. Sebben's Brief at 18-20. This is incorrect. After enactment of the 1977 amendments, no claim was decided under SSA's permanent standards alone. The 1977 amendments included many significant liberalizations to be applied in all claims, including those of short-term miners. All previously denied claimants were afforded the opportunity to submit new evidence. 30 U.S.C. § 945(a)(1)(B), (2)(B). The Secretary was prohibited from cross-examining or otherwise disputing

[18] Broyles and Sebben incorrectly dispute congressional awareness of the absence of disease or disability in short-term miners. In 1969 the U.S. Surgeon General reported: "It is generally accepted by physicians that simple pneumoconiosis seldom produced significant ventilatory impairment . . . . For work periods less than 15 years underground, the occurrence of pneumoconiosis among miners appeared to be spotty and showed no particular trend." House Comm. on Education and Labor, 91st Cong., 2d Sess., *Legislative History: Federal Coal Mine Health and Safety Act* 572-74 (1970). The long history of the Act contains a considerable body of similar testimony. *See Hearings on S. 355, S. 467, S. 1178, S. 1300 and S. 1907 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess. Part II at 587, 641, 699, Part III at A91-A96 (1969). Sebben's assertion (Sebben's Brief at 33) that neither Congress nor the Labor Department could have been aware of the study data cited in Pittston's Brief at 26 is incorrect. These data were derived from an ongoing study required by statute that began in 1970. 30 U.S.C. § 843. Cumulative data are reported to Congress 120 days after the beginning of each session of Congress. *Id.* § 958(a). There is no genuine scientific dispute over the fact that disabling pneumoconiosis in short-term underground miners is exceptionally rare and that it is essentially unknown in surface miners. *See generally* Lapp, *A Lawyers Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721 (1981).

a positive chest x-ray submitted by the claimant if it was originally interpreted by a qualified radiologist. *Id.* § 923(b).[19] Survivors of deceased miners were afforded the opportunity to obtain benefits solely on the basis of their own lay testimony. *Id.* Working miners were given the right to obtain an award if employment terminated within a specified period. *Id.* §§ 902(f)(1)(B), 923(d). And, the definition of "miner" was expanded to include many previously denied claimants. *Id.* § 902(d).

Labor's interim presumption neither defeats the purpose of the statute nor is it irrational. In fact, Labor's rule is perfectly consistent with a statutory scheme in which presumptions are available if duration of employment requirements are met, and unavailable if they are not met. *See id.* §§ 921(c)(1), (2), (4). It is perfectly consistent with the fact that there is little or no probability of a rational connection between proven disease and presumed total disability in the case of a short-term miner. It is also consistent with the Secretary's obligation to honor the statutory directive to permit an award only on account of total disability or death due to coal mine dust exposure. *See id.* § 901(a). And it is perfectly consistent with the Secretary's duty to preserve the rights of claim defendants and affordability of the program. Both Sebben and Broyles come to rest on the premise that the Secretary of Labor was obligated to ignore all other considerations and adopt the most generous entitlement scheme that could be devised. That is not a reasonable reading of the law. *Cf. Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 633 (1983).

Respondents' argument that the ten year rule is merely a litigation position is clearly erroneous. The rule was published in

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[19] In original budget data submitted to Congress, the Department of Labor estimated that the cost of the x-ray review prohibition in 30 U.S.C. § 923(b) would exceed the cost of the adoption of an interim presumption ($832 million versus $800.5 million). This estimate was revised downward on Labor's unfounded assumption that claimants' physicians would do a better job interpreting x-rays in the future. Staffs of Joint Comm. on Taxation and Senate Comm. on Finance, 95th Cong., 2d Sess., *Tax Aspects of Black Lung Legislation: S. 1538*, at 10 (Comm. Print 1977).

the Federal Register ten years ago by the Secretary of Labor. 43 Fed. Reg. 17,770 (1978). There has been no change in the rule or the agency's position since that time. Respondents characterize the Secretary's arguments as "post-hoc rationalizations of counsel" on the theory that the statutory arguments made by government counsel have been refined since the issue arose in 1981, Broyles' Brief at 46, and on the allegation that the Secretary has done an inadequate job explaining the ten year rule, Sebben's Brief at 37-38. These arguments are not persuasive. An agency is not required to set out its legal arguments in support of a rule prior to litigation. *Cf. Bellotti* v. *Baird*, 428 U.S. 132, 143 n.10 (1976).

Respondents ask this Court to apply the litigation position exception because of subtle refinements in agency arguments over the course of many years. This exception to the deference rule has not been stretched nearly so far by this Court. It is preposterous to suggest that an agency's published interpretation of a statute may be deprived of validity because successive government counsel become more skilled at arguing the agency's position over the course of repetitive litigation.

The existence of a litigation position to which no deference should be accorded may be discerned from a change in position during the course of litigation or from an absence of proof that the agency addressed and answered the question prior to litigation. *See Securities Indus. Ass'n* v. *Board of Governors*, 468 U.S. 137, 143-44 (1984). These circumstances do not exist here. The ten year rule is an unambiguous, published interpretation by the agency. The agency's actions in administering the rule have never varied. The arguments made by government counsel in support of the rule have been consistent. It is clear that the statutory interpretation reflected in Labor's rule was made by the agency and not its lawyers.

III. THIS COURT MAY NOT PROMULGATE SECTION 410.490 FOR THE SECRETARY OF LABOR

On the assumption that this Court will be persuaded of the invalidity of Labor's ten year rule, respondents ask the Court to

promulgate section 410.490's invocation (but not rebuttal) provisions for the Labor Department. Sebben's Brief at 38 n.76; Broyles' Brief at 47. Respondents assert that section 410.490(b) is part and parcel of the Act and thus requires no rulemaking for its application.

Courts are not vested with authority to write agency regulations. *See Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981). Congress neither wrote nor intended to write agency rules in 30 U.S.C. § 902(f). Congress provided guidelines to be sure, but it instructed the Secretary of Labor to promulgate regulations implementing the statutory guidelines. There can be no argument on this account. 30 U.S.C. §§ 902 (f) (1), 936(c); H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 308, 309.

What is most troubling about respondent's request that this Court simply declare section 410.490(b) to be a statutory provision is that the substantive standards at issue have never been tested in either the legislative or regulatory process. Congress had no evidence to support the creation of a presumption of entitlement based upon proof of simple pneumoconiosis in short-term miners. To the contrary, Congress had a considerable body of evidence that no such presumption could be justified. *See supra* pp. 10-11. There have never been rulemaking proceedings in which section 410.490 was tested as a regulation affecting private rights.

If section 410.490(b) is treated as a congressional enactment, it must meet the test of reason. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 29. On the face of the legislative record, a presumption of total disability or death due to pneumoconiosis for a short-term miner meeting the specified medical criteria is a purely arbitrary mandate. At best, Congress has never fully investigated the question. If section 410.490 is tested as an agency rule, it must glean support from the administrative record compiled by the agency. No such record exists.

It would be wholly inappropriate for this Court to adopt a rule of substantive law of considerable impact that has never passed muster in the legislative or regulatory process.

IV. THE MANDAMUS STATUTE DOES NOT OVERRIDE THE LONGSHORE ACT OR PRINCIPLES OF RES JUDICATA IN PART C BLACK LUNG CLAIMS

Sebben's arguments in support of the Eighth Circuit's decision presume that the body of procedural law that has evolved under the Social Security Act is applicable, at least by analogy, in Department of Labor black lung claims. The premise is clearly flawed. The Social Security Act does not apply. The Longshore Act sets the rules of procedure for these claims, 30 U.S.C. § 932(a), and it, like the Social Security Act, contains a unique and independent adjudicative format. *See Crowell* v. *Benson*, 285 U.S. 22 (1932); *see also Intercounty Constr. Corp.* v. *Walter*, 422 U.S. 1 (1975).

Longshore Act procedures are designed for the adjudication of private rights in the course of adversary litigation. *Crowell*, 285 U.S. at 51-54. Social Security procedures are not. *See Richardson* v. *Perales*, 402 U.S. 389, 403 (1971). After a Social Security Act claimant submits a proper claim, subsequent time limitations and exhaustion requirements may be waived. *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976). Prior to *Sebben*, all circuits agreed that each movement of a Longshore Act claim from one level of adjudication to another imposes a non-waivable jurisdictional requirement on the party seeking further agency or judicial review.[20] The Social Security Act authorizes eventual district court review of SSA decisions on the merits of the case, *Weinberger* v. *Salfi*, 422 U.S. 749, 763 (1975), while the Longshore Act does not, 33 U.S.C. § 921(e). It is arguable whether the Social Security Act embodies traditional res judicata principles. *See Schweiker* v. *Chilicky*, 108 S. Ct. 2460, 2468 (1988). The Longshore Act does embody such principles. 33 U.S.C. § 921(a),

[20] The many cases so holding are cited in Pittston's Brief at 37-38 nn.55 & 56; Secretary's Brief at 34.

(c); *Downs* v. *Director, Office of Workers' Compensation Programs*, 803 F.2d 193, 199 n.13 (5th Cir. 1986).

Sebben ignores the exclusivity of the Longshore Act remedy. He argues that the rights conferred by 30 U.S.C. § 945 to review under section 410.490 (or at least the invocation portion of it) are "collateral" to his claim for benefits and cannot be remedied under the Longshore Act. Sebben's Brief at 43-44. This argument is far off the mark. The right conferred in 30 U.S.C. § 945 is a right to utilize Longshore Act procedures for readjudication under an array of statutory provisions enacted in 1978. 30 U.S.C. § 945(a)(3)(A). Any such review was to be conducted under rules subsequently published by the Secretary of Labor. *Id.* §§ 902(f)(1), 936. There is no statutory guarantee that any or all of the revised rules must benefit every claimant. *Id.* § 945(a)(1)(A)-(B), (b)(2)(A). All claimants in the *Sebben* class had their claims reviewed pursuant to 30 U.S.C. § 945, but were denied benefits because the evidence failed to establish entitlement. Sebben is dissatisfied with the Secretary's application of the substantive law, but this is not collateral to Sebben's claim.[21] Congress has provided an exclusive procedure to address the dispute. 33 U.S.C. § 921(e).

Sebben's allegation that there was no adequate remedy at law is tied to the fiction that a claimant not provided "automatic" review[22] under section 410.490 would simply give up and fail to

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[21] Even if it were collateral, it is difficult to see what difference it makes with respect to the district court's jurisdiction under 28 U.S.C. § 1361. Sebben's reliance on *Eldridge*, 424 U.S. at 330-31 & n.11, regarding "collateral" matters is misplaced. *Eldridge* merely restates the rules governing appeals of non-final orders. All persons in the *Sebben* group had final orders, but did not exercise their appeal rights. Moreover, allegations of irreparable harm to *Sebben* class claimants are similarly without factual foundation or legal significance. No harm accrues to a litigant solely because he is required to advocate his case in keeping with statutory procedures.

[22] While some, but not all, of the claimants in the *Sebben* class were entitled to automatic review, none were entitled to an automatic award of benefits. In order to obtain a final award or sustain an initial determination, *see* 30 U.S.C. § 945(a)(2)(A), many of these claimants would be required to overcome

(Continued on next page)

pursue available remedies. Many claimants did not pursue their claims after automatic review, but many thousands did. We have no way of knowing what factors influenced their individual decisions. It is clear, however, that remedies were available. These remedies were published and fully adequate, and all claimants were informed of their rights.[23] These claimants, like all other civil litigants, are charged with knowledge of the available procedural rights. *Atkins* v. *Parker*, 472 U.S. 115, 130 (1985). Sebben contends that the pursuit of these remedies would have been futile, but does not and cannot make a showing to support that assertion. Failure to pursue these rights is clearly not a proper reason supporting equitable relief under the mandamus statute. *Cf. Lyng* v. *Payne*, 106 S. Ct. 2333, 2341 (1986).

For almost two centuries, this Court has refused to permit the exercise of mandamus powers if the party seeking the writ has an adequate remedy at law. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 169 (1803). If the alternative remedy prescribed is exclusive, and Congress has so provided, it is difficult to imagine circumstances in which mandamus powers are properly exercised.[24]

Building on the assumption that the claimants in the *Sebben* class never had a right to review de jure, Sebben asserts that res judicata principles become irrelevant. " '[N]o principle of law or equity . . . sanctions the rejection by a federal court of the salutary principle of *res judicata*.' " *Federated Dep't Stores, Inc.* v.

(Continued from previous page)

a mine owner's defense to the claim. Claimants who filed before July 1, 1973, *id.* § 945(a), or after March 1, 1978 were not entitled to automatic review but are included in the *Sebben* class. If Sebben's argument is accepted, the remedy cannot apply to those individuals because the Secretary of Labor did not owe them a non-discretionary duty of review.

[23] Department of Labor forms CM1000a, or 1000b, or 1000c, or 1000d were sent to all denied claimants and these forms each contained several pages of information on how a claimant could have pursued further remedies.

[24] An infringement of constitutional right would, in all likelihood, be an exception to the rule. *See Johnson* v. *Robison*, 415 U.S. 361, 366 n.7 (1974). This case involves no arguable claim of constitutional right on the part of the *Sebben* class.

Moitie, 452 U.S. 394, 401 (1981) (quoting *Heiser* v. *Woodruff*, 327 U.S. 726, 733 (1946)). Sebben fails to cite any exception to this rule to justify its abrogation here. In many of the *Sebben* class cases the employer litigated and prevailed. There is no precedent supporting the use of mandamus powers to undo the res judicata effect of these prior proceedings. It makes no sense for this Court to hold that the adjudications that took place and became final simply never happened.

Overall, Sebben's effort to sustain the Eighth Circuit's reopening of tens of thousands of cases rests on an exaggerated and contrived portrayal of the Secretary of Labor's alleged breach of duty to short-term coal miners, and an equally understated estimation of the enormous hardship that would follow enforcement of the Eighth Circuit's order. The clear non-discretionary duty on which Sebben relies is nowhere stated, with even minimal specificity, in the Act or legislative history.

Since mandamus is a remedy in equity, its impact on all parties involved must be considered. The insurance industry details the enormous potential cost to the coal industry and insurers of reopening and relitigating tens of thousands of affected claims.[25] Insurance Industry Brief at 9. It is noted, correctly, that none of this liability was anticipated or funded.

Reopening presents difficult problems beyond its economics. The claims affected will be ten to twenty years old by the time they are considered. Records have been lost and destroyed, witnesses are no longer available, and many miners are deceased. Moreover, it is extremely difficult to prove, in a presumption

[25] Sebben states that these costs are largely based on the irrebuttability of the SSA presumption. Sebben's Brief at 46. While rebuttability is a significant factor, it is not the fundamental premise of the insurers' cost analysis. Even if the Labor rebuttal provisions applied, invocation of the presumption remains the critical element in producing an award. The unfunded costs associated with reopenings, new trials, new evidence, and an aging population of claimants remains in the billions of dollars. The Court should also note that benefits are paid retroactively to the date of original filing in most cases. *See Curse* v. *Director, Office of Workers' Compensation Programs*, 843 F.2d 456, 461 (11th Cir. 1988).

rebuttal inquiry, that pneumoconiosis "played no part" in the inability of a seventy or eighty year old retired miner[26] or a now deceased miner to perform his prior coal mine work. *See Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). In many of these cases, the mine owners' first knowledge of the existence of a claim would occur in the reopening proceedings.[27] There is a genuine question whether a mine owner's due process rights can be preserved in these circumstances. *See Federal Deposit Ins. Corp.* v. *Mallen*, 108 S. Ct. 1780, 1788 (1988).

The circumstances neither permit nor otherwise justify the overwhelming relief granted by the Eighth Circuit. The Eighth Circuit had no sound legal basis for authorizing a waiver of the Longshore Act's jurisdictional requirements. It had no valid basis on which to abrogate res judicata to the substantial detriment of the private interests of mine owners and their insurers. The courts below erred in treating the Labor Department's black lung program as the legal equivalent of the entitlement programs administered by SSA, and they clearly misapprehended the respective rights of the parties as well as the legal duties of the Secretary of Labor.

[26] Most claims are first filed when a miner reaches normal retirement age.

[27] Labor did not necessarily notify defendants of the existence of claims unless, following an ex parte administrative denial, the claimant indicated an intent to further pursue the case. 20 C.F.R. § 725.412(a) (1988).

CONCLUSION

The decisions of the Fourth and Eighth Circuits should be reversed.

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Nos. 87-821, 87-827, and 87-109

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In the Supreme Court of the United States

OCTOBER TERM, 1988

PITTSTON COAL GROUP, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

ANN MCLAUGHLIN, SECRETARY
OF LABOR, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

CHARLIE BROYLES, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND EIGHTH CIRCUITS

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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No. 87-827

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v.

JAMES SEBBEN, ET AL.

No. 87-1095

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

CHARLIE BROYLES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND EIGHTH CIRCUITS

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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1. The primary issue before the Court is whether the Department of Labor's interim regulation applicable to claims filed before 1980, 20 C.F.R. 727.203, is consistent with the statutory commandment of Section 402(f)(2) of

the Black Lung Benefits Act of 1972, 30 U.S.C. 902(f)(2), that the regulation's "criteria * * * not be more restrictive" than those applied under HEW's interim regulation, 20 C.F.R. 410.490, which governed claims filed before July 1, 1973. Both the Labor and HEW interim regulations provide for a rebuttable presumption procedure by which claimants may be found entitled to benefits without direct proof of all of the statutorily required elements of 1) total disability; 2) caused by pneumoconiosis; 3) arising out of coal mine employment. *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs,* No. 86-327 (Dec. 14, 1987), slip op. 5. The courts below have ruled, incorrectly we submit, that the conditions for invoking the rebuttable presumption under the Labor regulation impermissibly result in more restrictive "criteria" than the HEW regulations. Specifically, under the HEW regulation some claimants who offer proof of pneumoconiosis but have fewer than ten years of coal mine experience may trigger the presumption by otherwise proving that coal mine employment was the cause of their disease, while under the Labor regulation no such alternative proof of causation may be offered by claimants with fewer than ten years of coal mine employment in order to trigger the presumption.

We argued in our opening brief that this difference in the method of proving coal mine causation in order to trigger the rebuttable presumption of entitlement to benefits is not a more restrictive criteria as that term is used in Section 402(f)(2). Section 402 defines various terms used in the statute, and Section 402(f)(2), which bars the use of more restrictive criteria, is part of the definition of "total disability." The criteria referred to thus bear on the issue of whether a person is totally disabled, not on the statutory requirement relating to coal mine causation of that disability. In our view, therefore, Congress in Section

402(f)(2) was referring to medical criteria relating to whether a claimant is totally disabled, not to HEW's evidentiary and adjudicatory rules, including its allowance of evidence other than duration of employment in order to prove coal mine causation.

The Sebben respondents contend in response that "total disability" is actually a "term of art" (Br. 23) embodying the three elements of entitlement to black lung benefits—total disability, pneumoconiosis, and coal mine causation. See also Broyles Br. 20 n.22. They rely on Section 402(f)(1)(A), 30 U.S.C. 902(f)(1)(A), also part of the definition of "total disability," which provides that "a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged." They also rely upon the definition of "pneumoconiosis" (§ 402(b), 30 U.S.C. 902(b)), which provides that it is a pulmonary disease caused by coal mine employment. Read together, they suggest, these provisions lead to the conclusion that "total disability" is the statute's way of referring to the ultimate question of entitlement to benefits, and the reference to "criteria" embodies any evidence bearing on that issue.

The *Sebben* respondents' construction of "total disability" to include not only the fact of disability, but also the disabling disease—pneumoconiosis—and its coal mine causation, is at best an awkward and counterintuitive use of language. Ordinarily, whether a person is totally disabled is considered a question distinct from what caused his disability. See *Black's Law Dictionary* 1336 (5th ed. 1979). Also, as the Sebben respondents concede (Br. 23 n.38), their construction is not supported by what would be several redundant references in the Act (see, *e.g.*, 30 U.S.C.

901(a), 922(a)(1) and (3)) to miners who are totally disabled "due to pneumoconiosis."

In addition, nothing in the history of the enactment of Section 402(f)(1)(A)—which contains the only reference to pneumoconiosis within the definition of total disability—suggests that Congress had a purpose to bundle the whole question of entitlement to benefits into the term "total disability." That section, which was added to the statute in 1972, had the distinct purpose to modify HEW's prior determination that a miner had to show inability to do *any* gainful work to be considered totally disabled, not to turn it into a term of art. See Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 4(a), 86 Stat. 153; S. Rep. 92-743, 92d Cong., 2d Sess. 16-17 (1972). Absent some clear indication of a further purpose to convert the definition of "total disability" into a term of art incorporating all the elements of a claim, "total disability" should be construed in light of its ordinary meaning. See *Mills Music, Inc.* v. *Snyder,* 469 U.S. 153, 164 (1985).

The Broyles respondents assert (Br. 39) that even if the "criteria" referred to in Section 402(f)(2) are medical criteria, the cause of a miner's disability is often a question best answered by a physician, so that the causation element of HEW's interim regulation is included in the criteria preserved by Section 402(f)(2). But that argument relies on the same counterintuitive concept of "total disability." What causes a miner's pneumoconiosis is a distinct question from whether the claimant is totally disabled. Notwithstanding that a physician's opinion may be relevant to the causation question, that opinion will rest on a distinct body of evidence and relate to a separate issue. The fact that medical expertise may be relevant on the question of causation does not suggest that the criteria used to define total disability include those used to determine causation.[1]

Both respondents concede (Sebben Br. 34-36; Broyles Br. 18 n.20) that Labor's interim regulation is not defective on the ground that it incorporates methods of rebutting the presumption of entitlement to benefits which were not expressly set forth in HEW's interim regulation.[2] In so doing, they have conceded that "criteria" does not include all the evidentiary and adjudicatory rules in HEW's interim regulation. Indeed, their concession applies to the most important adjudicatory rule because, as the Broyles respondents admit (Br. 24 n.24), whether a claimant obtains benefits "is ultimately determined using the various rebuttal methods." [3] Respondents thus urge that "criteria" in

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[1] The Broyles respondents also argue (Br. 25) that Congress intended "criteria" in Section 402(f)(2) to mean more than medical criteria relating to total disability because in Section 402(f)(1)(C), 30 U.S.C. 902(f)(1)(C), Congress required the use of "criteria" no more restrictive than those used by HEW in social security disability determinations, and vocational as well as medical criteria are both used in making social security determinations. The argument is without merit, however. Vocational and medical criteria are both relevant in determining whether a claimant is totally disabled. Causation is a distinct issue apart from the fact of total disability, and the manner in which it may be proved does not alter the criteria governing the existence of the disability in the first place.

[2] HEW's interim regulation provides for rebuttal by showing that the individual is doing coal mine work or comparable work or is able to do so. Labor's interim regulation allows rebuttal on these grounds, and also expressly authorizes rebuttal by showing that the miner's disability "did not arise in whole or in part out of coal mine employment" and that "the miner does not * * * have pneumoconiosis" (20 C.F.R. 727.203(b)(3) and (4)).

[3] The Sebben respondents similarly recognize (Br. 46) that the differences between the rebuttal provisions of the interim regulations are much more important, in practice, than the difference in the methods of invoking the presumptions. As they state, the predictions by the private petitioners (Br. 3 & n.7) and amicus National Council on Com-

Section 402(f)(2) refers to the adjudicatory and evidentiary rules employed by HEW in connection with invocation of the presumption, but not those relating to rebuttal of the presumption. Nothing in the language of the provision or its legislative history offers any basis for such a peculiar construction of the statute. Our interpretation, in contrast, is closely tied to both the language of Section 402(f)(2) and its legislative history, which show that Congress intended to require Labor to use HEW's medical criteria, particularly the ventilatory study scores in its interim regulation, in determining total disability, until it devised new "medical tests * * * which accurately reflect total disability in coal miners" (§ 402(f)(1)(D), 30 U.S.C. 902(f)(1)(D)).

In arguing that Labor was confined by HEW's approach to invoking the presumption, but not by its approach to rebuttal, the Sebben respondents rely explicitly on the Conference Report for the proposition that Congress clearly intended to require the use of the additional rebuttal methods recognized by Labor. That Report, they correctly note, clearly "mandat[ed] that 'in determining claims under [the interim] criteria all relevant medical evidence shall be considered in accordance with the standards prescribed by the Secretary of Labor.' " Br. 35 (quoting H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978)); see also Broyles Br. 18 n.20. In so acknowledging, however, they ignore the very next sentence of the Conference Report, stating that "all standards are to incorporate the presumptions contained in section 411(c) of the Act." Section 411(c)(1), 30 U.S.C. 921(c)(1), states that it should be presumed that "pneumoconiosis arose out of such employment" in cases involving claimants who worked for ten years as a coal miner. Congress thus attached great significance to the presumption of causation based on ten years of coal mine employment. In contrast, respondents have pointed to no evidence whatsoever that Congress intended that miners with fewer than ten years of coal mine experience should be allowed to establish a presumption of entitlement to benefits if they presented X-ray evidence showing pneumoconiosis.

The medical evidence underlying Congress's mandate that "all standards" incorporate the ten-year presumption contained in Section 411(c)(1) showed that miners were unlikely to have contracted disabling pneumoconiosis in that period of time, as we stated in our opening brief (at 23-24). In complaining (Sebben Br. 32) that we cited only one medical reference, respondents failed to note that the medical report we cited was appended to a 1977 congressional report, and hence is the most relevant study indicating what Congress understood at the time it enacted Section 402(f)(2), and that it summarized the evidence in a manner highly favorable to claimants.[4] As respondents

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pensation Insurance, et al. (Br. 9 & n.9) that a large number of claims that would be denied under Labor's interim regulation would be granted under HEW's interim regulation were based on the assumption that the additional methods of rebutting the presumption available under Labor's regulation would not be available if the respondents prevail here. If the additional rebuttal methods are available in any event and relevant evidence can be obtained, then it would seem that, as we suggested in our petition (at 12) in No. 87-827, the massive reopening ordered by the Eighth Circuit, while creating a substantial administrative burden, may change the result in relatively few cases.

[4] The medical reference was appended to the House Report in support of the provision in its bill that would have provided black lung benefits to all persons who worked for 30 years in coal mines (see H.R. Rep. 95-151, 95th Cong., 1st Sess. 5 (1977)). That provision, which was opposed by many members of the House committee (see *id.* at 80-84) and was not adopted by the Senate, was not enacted.

stated, the studies summarized in the medical report showed that miners with fewer than ten years' experience in coal mines may contract pneumoconiosis. However, "pneumoconiosis is customarily classified as 'simple' or 'complicated[,]' " and "[s]imple pneumoconiosis * * * is generally regarded by physicians as seldom productive of significant respiratory impairment." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). Congress plainly recognized in enacting the Black Lung Benefits Act that pneumoconiosis is not necessarily disabling, since, as Section 401(a) states, the purpose of the Act is to provide benefits to miners "totally disabled due to pneumoconiosis," not just to miners who contracted pneumoconiosis. Respondents failed to note that the studies summarized in the medical report appended to the House report showed that almost all cases of *disabling* pneumoconiosis occurred in miners with substantially more than ten years' experience.[5] In fact, the medical report suggested that paying miners benefits after 15 years of experience would "be good preventive medicine" since it would remove them from coal mines before they developed a disabling form of

[5] One of the studies summarized in the medical report showed that of 104 miners with more than 30 years of coal mine experience, 47 showed X-ray evidence of complicated pneumoconiosis or advanced simple pneumoconiosis, while none of the 35 miners with fewer than ten years of experience had complicated pneumoconiosis (H.R. Rep. 95-151, *supra*, at 34). Indeed, only two of the 35 miners with fewer than ten years' experience showed any evidence of pneumoconiosis (*ibid.*). Another study summarized in the medical report, which both respondents cited (Sebben Br. 32; Broyles Br. 40), showed a higher incidence of pneumoconiosis based on autopsy evidence. However, as the bar graph summarizing the autopsy study shows, complicated pneumoconiosis, as well as "severe" cases of simple pneumoconiosis, while common among miners with extensive experience, was uncommon among miners with fewer than ten years' experience (H.R. Rep. 95-151, *supra*, at 34).

the disease. H.R. Rep. 95-151, 95th Cong., 1st Sess. 33 (1977). In light of that evidence, it is implausible that Congress would have required Labor to presume that miners with X-ray evidence of simple pneumoconiosis but fewer than ten years of coal mine experience are entitled to benefits.[6]

Both respondents (Sebben Br. 36-37; Broyles Br. 41-42) contend that the Secretary's interpretation of Section 402(f)(2) is not entitled to deference because it is a post hoc rationalization that was not made contemporaneously with the implementation of the statute. There is no basis for that contention. Labor's interim regulation was finally promulgated on August 18, 1978, less than six months after the 1978 amendments took effect, and the first sentence of the regulation has always required that a claimant show that he "engaged in coal mine employment for at least 10 years" in order to invoke the presumption (20 C.F.R. 727.203(a)). The Secretary's interpretation is plainly a contemporaneous construction of Section 402(f)(2) that is entitled to deference.

[6] Labor, like HEW (see 20 C.F.R. 410.416(b)), has recognized that miners with fewer than ten years' experience may contract pneumoconiosis (see 20 C.F.R. 718.203(c)). Broyles, who had five years of coal mine experience and 20 years of experience in other dusty occupations, was "given the benefit of the doubt" that his pneumoconiosis was caused by coal mine employment (87-1095 Pet. App. 15a-16a). The Sebben respondents thus err in stating that "a person with 9.5 years of exposure * * * is barred from even attempting to prove that this condition was caused by mine employment" (Br. 29). Such claimants are barred only from establishing a presumption that they are entitled to benefits. And, while it would normally be the case that pneumoconiosis resulting from limited coal mine experience would not be disabling, nothing in the regulations prevents miners with fewer than ten years of experience from showing that they are totally disabled due to pneumoconiosis and hence entitled to benefits; again, they simply may not invoke a presumption of entitlement.

2. The Sebben respondents argue that the Eighth Circuit correctly ordered the Secretary to reopen all Part C claims arguably denied by virtue of the alleged defect in Labor's interim regulation. They rely on Congress's 1978 enactment of Section 435(b), 30 U.S.C. 945(b), directing the Secretary to review each claim denied prior to or pending on March 1, 1978, taking into account the provisions of the Black Lung Benefits Reform Act of 1977, including the "no more restrictive criteria" requirement of Section 402(f)(2).[7]

As an initial matter, it should be noted that it is undisputed that the Secretary reopened the Part C claims that had been denied and reconsidered them, along with unresolved, pending claims, under Labor's interim regulation. Thus, their claims were "automatically" reviewed in light of the 1978 amendments. And, as the evidence cited by the Sebben respondents shows (Br. 8 & n.21), review under Labor's interim regulation had a major impact, since the approval rate of Part C claims more than quadrupled (from less than 10% to 45%) under Labor's interim regulation. Claimants with fewer than ten years of coal mine employment benefited from the Secretary's review following the 1978 amendments since an expanded definition of pneumoconiosis (30 U.S.C. 902(b); 20

[7] The Sebben respondents admit (Br. 45 n.85) that the right to "automatic" review did not extend to two of the subclasses of their putative class. Those miners whose claims were denied under the Part B program had to request review in light of the 1978 amendments, and therefore had no right to automatic review. See 30 U.S.C. 945(a); 20 C.F.R. 410.704(d). Those miners who filed claims after the effective date of the 1978 amendments but before April 1, 1980, also had no right under Section 435(b) to automatic review of their files in light of the 1978 amendments, since they had not filed claims prior to the 1978 amendments. The Sebben respondents have provided no basis for reopening the claims of members of these subclasses.

C.F.R. 727.202, 718.201), a prohibition against re-reading certain X-rays (30 U.S.C. 923(b)), and worker's compensation principles of causation (S. Rep. 95-209, 95th Cong., 1st Sess. 13-14 (1977)) applied to their claims as a result of the amendments. In addition, the 1978 amendments gave them a right to a complete pulmonary examination at the expense of the Black Lung Disability Trust Fund. 30 U.S.C 923(b); 20 C.F.R. 725.406(c). In short, there is no basis for respondents' claim (Sebben Br. 40) that "the Secretary went through [a] largely meaningless exercise" in considering their claims in light of the 1978 amendments.

The members of the putative class contend only that Labor's interim regulation did not fully satisfy the "no more restrictive criteria" requirement of Section 402(f)(2). This argument could have been raised on administrative and ultimately judicial review of the post-1978 denials of those claims. And nothing in Section 435(b) suggests that Congress intended to exclude those claims from the provisions governing available administrative and judicial review. To the contrary, Congress intended such review to be available to "all claims certified, referred, or otherwise subject to review by the Secretary of Labor." H.R. Conf. Rep. 95-864, *supra,* at 23. In addition, as we stated in our opening brief (at 34), the statute sets *jurisdictional* time limits for claimants to seek review of decisions denying benefits.[8]

[8] See, *e.g., Danko* v. *Director, Office of Workers' Compensation Programs,* 846 F.2d 366 (6th Cir. 1988); *Butcher* v. *Big Mountain Coal, Inc.,* 802 F.2d 1506 (4th Cir. 1986); *Arch Mineral Corp.* v. *Director, Office of Workers' Compensation Programs,* 798 F.2d 215, 217 (7th Cir. 1986); *Clay* v. *Director, Office of Workers' Compensation Programs,* 748 F.2d 501, 503 (8th Cir. 1984); *Insurance Co. of North America* v. *Gee,* 702 F.2d 411 (2d Cir. 1983); but see *Brown* v. *Director, Office of Workers' Compensation Programs,* No. 87-7358 (11th Cir. Aug. 15, 1988).

Respondents have failed to justify the invocation of mandamus to compel the reopening of cases which the Secretary has already considered once pursuant to the automatic review requirement of Section 435(b). Even if one were to accept the argument (Sebben Br. 48-49) that a doubtful duty (such as the alleged duty under Section 402(f)(2) to allow claimants with fewer than ten years of coal mine experience to invoke the presumption of entitlement to benefits) may become sufficiently clear after a court construes a statute to justify mandamus relief (Br. 48-49), the Sebben respondents have neglected to explain how any provision in the Black Lung Benefits Act calls for any further reopening of claims that were finally denied after review under the 1978 amendments. Since nothing in the Act even arguably requires the Secretary to reopen yet again such claims which have not been pressed on administrative review, mandamus is plainly not warranted.[9]

[9] Even if one concluded, as we do not, that claimants had a "collateral" right to an automatic review of their claims under respondents' standard for invoking the presumption of entitlement to benefits (Sebben Br. 40-41), such a right would not excuse their failure to press that issue until long after their cases were closed. The primary relevance of such a conclusion would be that earlier—not later—review of the issue might be justified. See, *e.g., Mathews* v. *Eldridge,* 424 U.S. 319, 330 (1976) (plaintiff sought to go directly to court to expedite resolution of his claim).

In this case, recognition of a collateral right to automatic review under respondents' standard might have justified a petition to the Benefits Review Board—even before final consideration of their claims by an administrative law judge—to press for consideration of their claimed right to consideration under their standard. The Board recognizes the collateral order doctrine (*Morgan* v. *Director, Office of Workers' Compensation Programs,* 8 B.L.R. 1-491, 1-493 (Ben. Rev. Bd. 1986); *Holmes & Narver, Inc.* v. *Christian,* 1 B.R.B.S. 85, 88 (Ben. Rev. Bd. 1974)). Having failed to raise the issue either early or following denial of their claims, respondents certainly cannot invoke the collateral order doctrine to justify a right of review to be asserted whenever they please.

The Sebben respondents rely heavily on *Bowen* v. *City of New York,* 476 U.S. 467 (1986). In the process, they ignore the distinction between the concealed application of an illegal requirement to screen out claimants (as in *Bowen*) and the open and public application of a standard alleged to be incorrect.[10] The exhaustion requirement was waived in *Bowen* not because the agency applied the incorrect standard, but because it concealed from claimants, and thus prevented them from challenging in a focused way, the illegal hurdle it was placing before them (*id.* at 484-485). The administrative review process exists to allow for the correction of errors, and administrative autonomy justifies an exhaustion requirement so that the agency may have a chance to discover and correct its own errors. *McKart* v. *United States,* 395 U.S. 185, 195 (1969). Absent the sort of impairment of the review process identified in *Bowen,* there is no basis for a court to permit circumvention of a statutorily-mandated scheme of review.

Finally, the Sebben respondents present no reason not to invoke res judicata. They do not dispute that black lung adjudications resemble adversary court proceedings, which, as we stated in our opening brief (at 36), leads to the conclusion that their claims are barred. Respondents' sole discussion of res judicata (Sebben Br. 44-45) states that it does not apply because there has been no ruling on their asserted right to automatic review. But res judicata, of course, bars relitigation of issues that could have been raised in prior proceedings, whether or not they actually were raised. *Federated Department Stores, Inc.* v. *Moitie,* 452 U.S. 394, 398 (1981); 1B J. Moore, *Moore's Federal Practice* ¶ 0.405[3], at 190-193 (1988). Accordingly, the Eighth Circuit erred in ordering the Secretary of Labor to

[10] This case is also distinguishable from *Bowen* by the jurisdictional nature of the time limits under the Black Lung Benefits Act.

reopen claims that had been finally denied.[11]

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

GEORGE R. SALEM
Solicitor of Labor
Department of Labor

AUGUST 1988

[11] As noted in our opening brief (at 38), the reopening effort mandated by the Eighth Circuit would place an enormous strain on the black lung benefits adjudicatory system. The Sebben respondents' prediction that initial reviews can be conducted quite expeditiously (Br. 46 n.87) is based on the Labor Department's performance in the wake of the 1978 amendments when Congress, after ordering reopening of numerous claims, appropriated funds for 564 new staff positions, 453 of which were four-year appointments. See Secretary of Labor, *Annual Report to Congress on the Black Lung Program* 6 (1977).

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Nos. 87-821, 87-827 and 87-1095

IN THE

Supreme Court of the United States

OCTOBER TERM 1987

PITTSTON COAL GROUP, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

ANN MCLAUGHLIN, SECRETARY, UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Petitioners,

v.

JAMES SEBBEN, *et al.*,

Respondents.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Petitioners,

v.

CHARLIE BROYLES, *et al.*,

Respondents.

BRIEF AMICI CURIAE OF THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, THE AMERICAN INSURANCE ASSOCIATION, THE ALLIANCE OF AMERICAN INSURERS AND THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

Amici curiae,[1] the American Insurance Association, Alliance of American Insurers, National Association of Independent Insurers and the National Council on Compensation Insurance, respectfully request that the decision of the United States Court of Appeals for the Eighth Circuit entered on March 25, 1987, and

1. In accordance with Rule 36.1, the written consent of the Pittston Coal Group, *et al.*, the Solicitor General, James Sebben, *et al.*, and Charlie Broyles, *et al.*, are submitted herewith.

the decision of the United States Court of Appeals for the Fourth Circuit entered on July 31, 1987, be reversed by this Court.

INTEREST OF AMICI

The American Insurance Association ("AIA"), the Alliance of American Insurers ("Alliance") and the National Association of Independent Insurers ("NAII") are separate, independent, not-for-profit insurance industry trade associations. Their collective membership includes more than 850 insurance companies and their subsidiaries. Member companies write more than 85% of the premium dollar volume of workers' compensation insurance coverages sold in the United States. Members within each association directly provide coverage to coal mine operators for claim liabilities arising under the Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1982) (the "Act").

AIA, Alliance and NAII member companies also provide a wide variety of property-casualty and general liability lines of insurance to commercial enterprises throughout the United States. These amici represent the interests of their members in matters of special concern to the commercial liability insurance industry. Many AIA, Alliance and NAII members have a direct substantial economic stake in the outcome of this litigation. Perhaps, even more importantly, the circumstances that give rise to these appeals pose difficult and troubling questions that go to the very heart of the ability of the insurance industry to respond in the future to commercial insurance risks created by the Congress and federal agencies.

The National Council on Compensation Insurance ("NCCI") is the largest not-for-profit workers' compensation insurance service organization in the United States. Its membership includes more than 700 insurance companies and competitive state insurance funds that provide workers' compensation insurance coverage to employers throughout most of the United States. In thirty-five states, including most major coal mining states, NCCI collects data and develops premium rates and rating plans for workers' compensation insurance. NCCI also manages various

workers' compensation assigned risk plans and the National Workers' Compensation Reinsurance Pool (the "Pool"). Pool members reinsure among themselves several categories of risk that arise under the Act. In particular, the Pool is the only commercial vehicle available to small or high-risk mine operators that are unable to qualify to self-insure their federal black lung liabilities under U.S. Department of Labor regulations, 20 C.F.R. Part 726 (1987), or to purchase direct coverage from a state fund or insurance carrier. Most of NCCI's members and many AIA, Alliance and NAII members participate in the Pool and are individually liable to the Pool for losses or payouts on claims that exceed the ability of the Pool to make payments from insurance premiums collected. Historically, 15% to 20% of all federal claim liabilities are insured or reinsured by the Pool. Approximately 50% of federal black lung liabilities that may be allocated to an individual mine owner are commercially insured.[2] The companies and competitive state insurance funds represented by all amici account for more than 98% of the premium dollar volume of all U.S. workers' compensation coverages, including those available under the federal black lung program.

In black lung claims the insurer is a party to the litigation and, as such, participates directly on behalf of its insured. 20 C.F.R. § 725.360(a)(4); *Warner Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 804 F.2d 346 (6th Cir. 1986). In this capacity, the insurance carrier hires defense counsel and bears the cost of claim litigation and administration.

The commercial liability insurance industry has a direct, immediate and substantial interest in the outcome of this litigation.

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2. Liability arising out of claims in which the miner was last employed prior to January 1, 1970, and certain uninsured liabilities are paid by the Black Lung Disability Trust Fund. 30 U.S.C. § 934(a). The Trust Fund is financed by a producer tax on coal. 26 U.S.C. § 4121.

STATEMENT OF THE CASE

A. History

In 1969, Congress enacted the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, to improve safety conditions in U.S. coal mines and reduce the exposure of coal miners to hazardous dust produced in mining operations. In response to a generally correct perception that miners affected by coal-dust related disease ("pneumoconiosis" or "black lung" disease) had been unable to obtain benefits under state workers' compensation laws, the 1969 Act also included among its provisions a separate Title IV to establish a temporary[3] federally financed black lung remedy for miners and their families.

The program contemplated an open filing season for claims terminating on December 31, 1972, and the eventual correction of inadequacies in state workers' compensation laws. 83 Stat. 795. During the initial period, claims were to be filed with, adjudicated and paid by the Secretary of Health, Education and Welfare, employing the resources of the Social Security Administration ("SSA"). Benefits awarded were to be paid by the U.S. Treasury, and claims were to be decided under the eligibility rules and adjudication procedures of sections 205 and 223(d) of the Social Security Act, 42 U.S.C. §§ 405, 423(d), *incorporated by reference into* 30 U.S.C. §§ 902(f), 923(b). The SSA portion of the program was called "Part B." 30 U.S.C. §§ 921-925.

After the termination of Part B, it was anticipated that all new claims would be filed under applicable state workers' compensation laws. *Id.* § 931. In recognition of the possibility that all states might not have had an adequate state law in place by 1972, the original Act contemplated the extension of the federal program to 1976. It provided that a miner residing in a state not having an adequate workers' compensation law could file a claim with the Secretary of Labor under a new program called "Part C." Part C claims were to be filed with the Secretary of Labor and adjudicated under the adversarial litigation provisions of the

3. The original program was to expire in its entirety on December 30, 1976. 83 Stat. 796.

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-952, *incorporated by reference into* 30 U.S.C. § 932(a). Part C claims were to be funded by mine owners. Mine owners were directed either to self-insure this risk or purchase commercial insurance. 30 U.S.C. § 933.

The original black lung Act contained four eligibility rules: (1) total disability was to be determined on the basis of medical criteria not more restrictive than those applied under 42 U.S.C. § 423(d); (2) an occupational cause could be rebuttably presumed if a miner with ten or more years of exposure had pneumoconiosis; (3) death due to pneumoconiosis could be rebuttably presumed if the miner had ten years of exposure and died due to a respiratory disease; and (4) a mandatory inference required the payment of benefits to any miner suffering from the most advanced stage of black lung disease. 30 U.S.C. §§ 921(c), 923(b). These provisions applied to both Part B and Part C claims. 83 Stat. 797.

In 1972, Congress amended the law in several respects. Black Lung Benefits Act of 1972, 86 Stat. 150. The most significant thing that happened in the 1972 legislative process produced no statutory amendment. Rather, in a Senate Report, SSA was directed to write regulations containing "interim evidentiary rules and disability evaluation criteria" to ensure the prompt processing and payment of SSA claims. S. Rep. No. 743, 92d Cong., 2d Sess. 16, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2305, 2322-23. Whatever the Senate Committee meant by this is not on the public record, but in hindsight it is apparent that several key members of Congress simply wanted SSA to pay most claims whatever their merits. *See* Nelson, *Black Lung: A Study of Disability Compensation Policy Formation* 92 (1985) (noting, "SSA officials working closely with the members of the Committee staff developed a strategy for implementing the amendments that would allow SSA to pay most of the claims. The essential element of that strategy was some seemingly innocuous language added to the committee report.").

In response, SSA published a rule popularly known as the "interim presumption." It could not be applied to Labor Department claims. 20 C.F.R. § 410.490 (1987). After a brief comment period, SSA began to apply the rule. The rule itself was designed without input from SSA's medical staff[4] and implemented without public input. Since it had no application to mine owners and reflected only the private arrangements between SSA and its congressional overseers, the implementation of the rule went largely unnoticed. To this day, there is no way of knowing how SSA applied its rule.[5] The language of section 410.490 is duplicative and ambiguous and all that is certain is that it produced awards. It is not surprising that in congressional hearings from 1973 to 1975 the Labor Department noted that the inapplicability of section 410.490 was a major reason why Labor was unable to approve as many claims as had SSA. *See Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources,* 95th Cong., 1st Sess. 49 (1977).

When in the late 1970s it was resolved again to amend the Act, the House of Representatives settled upon several amendments that would have changed the character of the Labor program to make it more like SSA's, and to facilitate results in claim determinations that approximated SSA's experience. The House had been told that SSA's presumption could not be constitutionally applied in litigated claims involving mine owners.[6] To overcome

4. *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor,* 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, Social Security Administration).

5. *See* Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues,* 83 W. Va. L. Rev. 869, 897 (1981) (observing "it must be understood that the SSA and Labor versions [of the interim presumption] . . . can be contrasted in the hypothetical only. An attempt at explaining how SSA applied the interim presumption . . . would be to engage in speculation, at best.")

6. *See* H.R. Rep. No. 770, 94th Cong., 2d Sess. (1975), *reprinted in* House Comm. on Education and Labor, 96th Cong., 1st. Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print 1979).

this obstacle and to implement still further liberalizations of entitlement rules of questionable scientific merit, the House enacted a bill that would have eliminated mine owners' rights to contest claims yet retaining their obligation to finance benefits. This scheme would have created several new "irrebuttable" presumptions, would have left SSA with sole authority to write eligibility regulations, and would have required application of "criteria" no more restrictive than SSA's, as a last resort, in the consideration of Part C claims. H.R. 4544, 95th Cong., 1st Sess. §§ 2, 8, 9 (1977).

The Senate took a more moderate course that retained the essential characteristics of Part C as a workers' compensation program, eschewed the extravagant eligibility rules proposed by the House, and directed the Secretary of Labor to write medically sound eligibility rules. S. 1538, 95th Cong., 1st Sess. (1977). Although the final bill conformed for the most part to the Senate proposal, the compromise reached retained two key House provisions. All previously denied claimants were to have their claims reviewed either automatically (Part C claims) or at the claimant's option (Part B claims), and criteria no more restrictive than those applied before July 1, 1973, by SSA were to apply under Labor Department rules to all reviewed claims and a limited category of new claims. 30 U.S.C. §§ 902(f)(2), 945.

In keeping with this directive, Labor promulgated its version of the interim presumption. 20 C.F.R. § 727.203 (1987). Labor's rule differs from SSA's. Both rules establish a rebuttable presumption of eligibility for benefits under the Act. The Labor presumption is more easily invoked in most cases, except that a miner with less than ten years of coal mine employment and positive x-ray evidence is permitted to invoke SSA's rule but not Labor's. Labor's presumption is rebuttable but, according to the circuits, SSA's is not generally rebuttable. Section 410.490 is rebutted only if the miner "is either doing or capable of doing his usual coal mine work" whether or not the inability to work is

black-lung related. *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987), *cert. granted*, 108 S. Ct. 1288 (1988). "Section 410.490 cannot be rebutted by medical evidence." *Cook* v. *Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1185 (7th Cir. 1987). By contrast, the Labor Department's presumption may be rebutted by the defendant if the relevant medical proof establishes that the miner is not totally disabled by, or does not suffer from, or did not die due to black lung disease. 20 C.F.R. § 727.203(b); *see Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 432 (1987). Section 410.490, as it has been interpreted, provides benefits whether or not a miner's absence from the workplace is caused by black lung disease, and in some instances, whether or not the miner actually suffers from this occupational disease. *See Cook*, 816 F.2d at 1185; *compare* 20 C.F.R. § 410.490(c) *with id.* § 727.203(b).

These differences notwithstanding, Labor obtained pre-publication clearance for its rules from the leadership of the House Committee on Education and Labor that had so aggressively pursued an SSA-like entitlement scheme. *See* Letter from Representatives Perkins, Dent and Simon to Robert B. Dorsey, U.S. Department of Labor (May 25, 1978). The Labor rules were published for comment and promulgated without change in August 1978. 43 Fed. Reg. 36,825-26 (1978). From the beginning, section 727.203 was consistently applied by the Labor Department to require ten years of coal mine employment for its invocation and to permit the rebuttal of presumed facts.

The series of cases that resulted in these appeals questions whether Labor was authorized to write a rule that did not produce the same result as section 410.490. In *Broyles*, the Fourth Circuit held that Labor was not so authorized and the court directed the Secretary to apply section 410.490 in pending Labor Department claims.[7] 824 F.2d at 329. In *Coughlan* v. *Director, Office*

7. The Seventh Circuit disagreed with the Fourth Circuit's conclusion, finding the Labor rule valid. *Strike* v. *Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987); *Taylor* v. *Peabody Coal Co.*, 838 F.2d 227 (7th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3739 (U.S. April 15, 1988) (No. 87-1720). The Third Circuit finds the Labor rule invalid. *Sulyma* v. *Director, Office of Workers' Compensation Programs*, 827 F.2d 922 (3d Cir. 1987). The Sixth Circuit agrees that the Labor ten-year rule is invalid, but permits rebuttal by the Labor formula. *Kyle* v. *Director, Office of Workers' Compensation Programs*, 819 F.2d 139 (6th Cir. 1987), *petitions for cert. filed*, 56 U.S.L.W. 3643, 3484 (U.S. Dec. 21, 1987) (Nos. 87-1045, 87-1065).

of Workers' Compensation Programs, 757 F.2d 966 (8th Cir. 1985), the Eighth Circuit had reached the same conclusion as the Fourth Circuit. Then, in *Sebben* v. *Brock*, the Eighth Circuit ordered the Secretary of Labor to reopen and readjudicate under the SSA rule all of the claims subject to an interim presumption that were previously denied by Labor.

Available data indicate that 155,000 claims are potentially affected by the decision in *Sebben*, of which 94,000 involve miners with fewer than ten years of coal mine employment.[8] Insurance industry actuaries estimate that the combined effect of *Sebben* and *Broyles* will add from three billion dollars to six billion dollars or more to the aggregate liability of the Black Lung Disability Trust Fund, employers and their insurance carriers.[9] The cost of readjudication would range from two hundred million to four hundred million dollars.

8. *See* Petition for a Writ of Certiorari filed by the Solicitor General in No. 87-827 at 11; *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 7, 102, 186 (1981) (prepared statements of Morton E. Henig, U.S. General Accounting Office, Sam Church, Jr., President, United Mine Workers of America, and Charles Coakley, AIA).

9. The rationale for this conclusion includes a number of variables. The non-rebuttability of section 410.490 is a major factor. The inability or unwillingness of the Department of Labor to vigorously defend claims is another. *See* Comptroller General of the United States, *Report to the Congress: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* (1982). There are many others as well, including the fact that each reopened claim would involve a new trial with new evidence and a much older miner. Since pulmonary capabilities diminish with age, many claimants would be able to establish the interim presumption simply by having grown older. *See supra* note 4 (testimony of Dr. Harold I. Passes).

B. Insurance Industry Involvement

Insurance carriers called upon to underwrite the federal black lung risk have always faced difficult challenges. The coal industry, unlike some other major industrial sectors of the economy, is composed of thousands of mostly small producers. Most of these companies would have no financial ability to pay or even defend a single claim, the cost of which averages from $118,315.88 for a claimant without dependents to $185,659.69 for a married miner. Costs can go much higher. *See* U.S. Dep't of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* 32 (1981).

Workers' compensation insurance, unlike most commercial lines, cannot limit the maximum liability of the carrier. If a carrier offers workers' compensation coverage, it must provide full coverage for the insured employer's statutory workers' compensation liability, come what may, in order for the employer to comply with mandatory insurance requirements imposed by state workers' compensation laws.[10] Under laws regulating the business of insurance, retroactive adjustment of workers' compensation premium rates to cover losses generated by the insurance carriers' miscalculations of the cost of a risk is impossible. The entire estimated cost of insuring a risk is fixed at the time a policy is sold and, when an occupational disease claim is filed, it attaches to the policy in effect at the time of the worker's last employment. *See* 20 C.F.R. § 726.203. Premiums collected for that policy must cover all claims attributable to that policy. Premiums charged for policies in future years are not and cannot be calculated to pay the cost of previously incurred claims.

For these reasons, workers' compensation insurance premium ratemaking has evolved into an exacting science. Predictability, certainty, and a careful evaluation of potential risks are critical features of this very complex process. Pooling arrangements,

10. State insurance officials regulate insurance premium rates and policy provisions. In workers' compensation lines of coverage, the carrier must provide full coverage for all insured employers. The Act contemplates the regulation of rates and coverages for the federal program by state agencies. 30 U.S.C. § 933(a).

like the National Workers' Compensation Reinsurance Pool, are essential to accommodate otherwise uninsurable employers. To avoid catastrophic unfunded losses, industry specialists devote great care to reach an understanding of the nature of the risk to be insured. Sometimes errors are made, and the carriers and pools are answerable when that occurs.[11] That is to be expected and is simply a reality of the insurance business.

What makes this case different, and the result that would flow from *Sebben* exceptionally inequitable, is that the workers' compensation insurance industry was not asked to, did not, and would not have insured the risk created by the SSA presumption. That risk has little or no relationship to total disability or death due to black lung disease. The SSA provision, by its plain language, compensates unemployment, disabilities whatever their cause, retirement and old age. The workers' compensation insurance industry wrote no policies, collected no premium and had no basis on which to ascertain that, in writing a workers' compensation insurance policy covering mine owners, it was insuring the life and health of all coal miners. If *Sebben* and *Broyles* are correct, this industry, the coal industry, the Department of Labor, energy and insurance consumers and probably most of the members of Congress itself have been the victims of an atrocious delusion.

SUMMARY OF ARGUMENT

The decisions of the Fourth and Eighth Circuits operate in concert to redesign the fundamental concept of the Department of Labor's black lung program. Together they require the insurance industry, and to a much larger degree, the coal industry, to fund benefits to coal miners that are in no way justified. The benefits are called "black lung" benefits, but even a cursory review of the two regulations at issue, the SSA rule and the Labor rule, reveals that the latter may involve compensation for black lung disease, but the SSA rule does not.

11. If errors are made in favor of the industry, future rate calculations must reflect an appropriate adjustment.

We believe that Congress intended this important difference between the two programs. But the words used to convey this intent in the statute and its legislative history lack precision. The legislative context is ambiguous, perhaps by design. In attempting to structure a black lung workers' compensation program in keeping with Congress's intent, the Department of Labor developed an eligibility regulation in section 727.203 that is likely to be the most plaintiff-favorable-burden-of-proof-shifting vehicle ever designed by a federal agency for adversary litigation. But in doing so, Labor opted to maintain some scientific validity in its standard and permitted claim defendants the opportunity to prevail in a non-meritorious claim. The Secretary of Labor's perception of the agency's mission is entitled to deference, and the agency's rule should be sustained. Section 410.490 is a private rule with a hidden purpose and has no place in the Part C black lung program. Under the SSA rule, proven facts do not produce a factually true inference of a claimant's right to benefits, and presumed facts are essentially irrebuttable. Section 410.490 violates the Due Process Clause of the Fifth Amendment to the United States Constitution for this reason.

The Eighth Circuit's decision mandating the relitigation of tens of thousands of closed cases is not authorized by any source of law. The Longshore Act precludes the exercise of jurisdiction over claims outside of prescribed statutory procedures. Longshore procedures are preemptive and the pursuit of the remedies they provide is mandated for any party seeking relief from a black lung claim determination. The procedures reflect the principle of res judicata, and res judicata applies to completed adjudications in black lung claims, including those claims in the *Sebben* group.

The decisions below will so enormously disrupt the continuation of this important federal program and produce such completely unjustified liabilities for the insurance industry and the coal industry that they must be reversed. In both *Sebben* and *Broyles*, the circuits have committed error in need of expeditious correction.

ARGUMENT

I.
CONGRESS NEITHER REQUIRED NOR INTENDED TO REQUIRE THE LABOR DEPARTMENT TO APPLY THE SSA RULE

This case turns on the validity of the Department of Labor's regulation. If in requiring ten years of employment and permitting rebuttal in 20 C.F.R. § 727.203, the Secretary of Labor acted reasonably and in accord with the Act, the inquiry in these cases is fully answered. *See Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To sustain the rule, the agency must articulate its reasons for acting as it did. If these reasons are consistent with the Act and in accord with its purposes and if the result is not arbitrary, the rule is valid. *See NLRB* v. *United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987). Where ambiguity deprives the statutory language of undeniable meaning, this Court typically defers to the agency's interpretation, so long as the interpretation is permissible and does not lead to an arbitrary and capricious result. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Here, both courts below began and ended their analyses with the term "criteria" in section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2), finding in it an unambiguous intent on the part of Congress to require Labor to apply the SSA rule. The Department of Labor has consistently interpreted "criteria," in its statutory context, to have a more limited meaning. Although the plain meaning of the term is large and loose, there are indications in the statute and legislative history that it had a fairly specific meaning for congressional drafters, which was properly ascertained by the Secretary of Labor.

All related sections of the Act should be interpreted as a part of an harmonious whole. *See Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 614-17 (1944). The Act, as a whole, gives the Secretary of Labor broad regulatory authority to define the elements of entitlement to benefits. 30 U.S.C. §§ 902(f)(1),

932(c), (h), 936(a). Section 902(f) addresses only those standards that relate to the definition of "total disability," *and within that limited context* the SSA rule permits an inference of "total disability" if the specified medical criteria are met, *i.e.*, positive x-ray, autopsy, or biopsy evidence demonstrating occupational pneumoconiosis or ventilatory test results at a specified level. 20 C.F.R. § 410.490(b). Whether an x-ray, autopsy or biopsy actually shows pneumoconiosis is not related to the issue of total disability. It is a mixed question of causation that requires the expert interpretation of medical tests. The Secretary is independently authorized to regulate concerning causation in 30 U.S.C. § 932(h) and to regulate concerning medical tests in 30 U.S.C. §§ 902(f)(1)(D) and 923(b). Whether this separate regulatory authority is overridden by section 902(f)(2) is ambiguous.

The term "criteria" itself is also used at two other places in section 902(f). Section 902(f)(1)(C) employs similar language to that used in section 902(f)(2): "regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act." 30 U.S.C. § 902(f)(1)(C). Typically, SSA disability "criteria" consist of listings of medical test results giving rise to an implication of total disability. *See* 20 C.F.R. Part 404, subpart P, app. 1 (1987). Also, 30 U.S.C. § 902(f)(1)(D) uses the term "criteria" to refer to "medical tests."

It is also significant that the plain language of section 410.490 is inconsistent with several provisions of the Act. Section 401(a) of the Act states that the purpose of the Act is to provide benefits for total disability or death due to pneumoconiosis. 30 U.S.C. § 901(a). Section 410.490 provides benefits far beyond that premise. Section 413(b) of the Act requires the consideration of all relevant medical evidence in claim litigation. 30 U.S.C. § 923(b). Section 410.490 renders such evidence irrelevant. Section 402(f)(1)(A) of the Act directs the Secretary of Labor to define "total disability" to permit an award only when "pneumoconiosis" prevents the miner from working. 30 U.S.C.

§ 902(f)(1)(A). Section 410.490 makes pneumoconiosis irrelevant to the miner's eligibility in many cases.

These references demonstrate in this exceptionally complex regulatory environment that the mandate of section 902(f)(2) is less than crystal clear. For this reason, and perhaps more importantly because of the exceptional controversy that characterized the debate over the interim presumption, consultation with external authorities, including the legislative and regulatory history of the matter, is compelled.

If Congress meant in section 902(f)(2) that the Secretary of Labor was to repromulgate the SSA regulation or adopt all of its provisions as a starting point, it chose very curious language to convey that message. What is more likely is that the Secretary of Labor was given a mandate to regulate in light of a broadly defined set of congressional expectations, and was aware that the regulations would be informally reviewed by the most interested members of Congress before publication.[12]

As an academic exercise in interpretation, the legislative history and circumstances surrounding publication of the Labor rule present many difficulties. Enlightenment and clarity are elusive. The Solicitor General and the parties will surely survey the many legislative references and extract meaning from them. All that seems certain is that the Secretary of Labor was to write a separate rule and that the Secretary was compelled to include within that rule provisions allowing rebuttal. H.R. Rep. No. 864, 95th Cong., 2d Sess. 13, 16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 309; 124 Cong. Rec. 2333, 3426, 3431 (1978). It was also understood that Labor was authorized to depart from the SSA usages to some significant degree. *Id.* Whether Labor's departure, particularly with respect to the ten-year x-ray invocation standard,[13] overstepped the Act or the bounds of reason is not

12. That this procedure was followed is well documented. *See* Solomons, *supra* note 5, at 896-97 & n.138; Letter from Representatives Perkins, Dent and Simon to Robert B. Dorsey, *supra* p.8.

13. On the matter of rebuttability, all sources of authority point to the conclusion that Labor was required to permit rebuttal of presumed facts. Although *Broyles* holds to the contrary, its holding is devoid of rationale, and there is none.

an answerable question within the language of the Act or the legislative history.

In this setting, judicial deference is required if Labor is able to explain its decision. Labor asserts that the word "criteria" in section 902(f)(2) means only medical criteria as distinct from "evidentiary standards." Additionally, miners with fewer than ten years of exposure do not; as a medical matter, contract disabling black lung disease and it is unreasonable to so presume. Perhaps the ten-year standard was employed to screen in the claimants most likely to be deserving and to impose a higher standard of proof on the others. Perhaps Congress left to the Secretary the discretion to compromise the demands of those few members of Congress with a "pay everybody" philosophy with the more moderate views of other members. Certainly, the Secretary's duty to factor in the rights of claim defendants also played a role.

In the aggregate, these reasons support the Secretary's exercise of discretion and validity of the rule. The deference equation requires no more, and here a traditional inquiry sustains the rule. *See American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 514 (1981).

The insurance industry's contribution to this debate arises from our long-standing perception that Congress and the Department of Labor harbored no intent to lure the industry into writing insurance coverage for an uninsurable risk. Total disability or death due to black lung disease is an insurable risk. The unemployment, general disability, retirement or death of coal miners, within the guise of a workers' compensation program, is not. The history of the insurance industry's involvement demonstrates special concern for insurability and strongly supports the Government's understanding that in designing section 727.203, the agency was required to preserve some measure of fairness for the private parties involved.

Mine owners are required to obtain adequate insurance coverage, 30 U.S.C. § 933, but the insurance industry is not required to sell it. In 1973, when the insurance industry was approached by

the Department of Labor and asked to provide coverage for federal liabilities, many in the industry felt that the risk they were invited to underwrite was either unacceptable or that coverage could not be affordably provided.[14] Given repeated assurances by the Department and Congress during the period from 1973 to the present day that the black lung claims process would, notwithstanding a uniquely generous entitlement scheme, preserve both fairness and predictability in claims adjudications, the insurance industry provided coverage at affordable rates.

Following liberalizations of entitlement rules in the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, and largely because of section 727.203, it became clear that earlier funding assumptions were no longer viable and would produce catastrophic unfunded and unanticipated losses for the industry and mine owners. In response, the insurance industry, the Labor Department, mine owners, representatives of workers and claimants, and Congress worked together to revise the Black Lung Program and its funding mechanisms to restore equilibrium.[15] House Comm. on Ways and Means, Subcomm. on Oversight, *Report and Recommendations on Black Lung Disability Trust Fund*, 97th Cong., 1st Sess. 16, 30 (Comm. Print 1981); *see also* H.R. Rep. No. 1410, 96th Cong., 2d Sess. 2-3 (1980) ("[T]he 1977 Amendments were unfair in imposing ... this

14. *Hearings on H.R. 10760 and S. 3183 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 479-81 (1976).

15. This cooperative effort produced the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635. But even this substantial effort proved insufficient to ensure adequate funding for the program. In 1985 and again in 1987, Congress found it necessary to enact additional fiscal relief for the Black Lung Disability Trust Fund by raising and then extending the producers tax on coal that provides revenue for the payment of claims by the Fund. 26 U.S.C. §§ 4121, 9501; Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (d), 100 Stat. 312, 313 (1986); Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503 (1987). The Fund pays benefits in those cases in which no mine operator or insurer can be found individually liable. 30 U.S.C. § 934. The Fund is currently more than $3 billion in debt to the U.S. Treasury, having borrowed this amount to make up the difference between coal tax revenues and benefit payment obligations.

retroactive liability. . . . [T]he combined effect of the 1977 law requiring the automatic review of old (federal) claims, under new liberalized eligibility criteria, and of directing that those approved be paid by coal operators—either directly or through the Trust Fund—has produced a harsh result on operators (and their commercial insurers) who had no reason to anticipate that they would be held directly liable.").

The partnership between Congress, many federal agencies and the commercial liability insurance industry is pervasive. This industry is called upon frequently to assist Congress in the implementation of national policies by providing private parties the insurance coverage they need to be in compliance with federal laws.[16] In order for this partnership to be maintained, there must be an acceptable level of predictability and stability in the risks Congress creates. The partnership cannot survive if the industry is considered merely an adjunct to the Federal Treasury whenever Congress decides to be more generous, but does not want to pay the cost of its largess. Congress is well aware of this fact. It is unimaginable that Congress would, in the black lung program, ask the insurance industry to fund a compensation scheme based on the SSA presumption. It is equally improbable that Congress would do so without clearly expressing such intent.

When Congress liberalized the Act in 1978, most of the claims here in question were already insured under preexisting insurance policies. Those policies provided coverage only for total disability or death due to black lung disease and they cannot be rewritten. There is no proof that the 1978 amendments would rewrite these policies to require payment for unexpected and unknown risks wholly divorced from the stated purpose of the Black Lung Act. *See* 30 U.S.C. § 901(a) ("It is, therefore, the purpose of this title to provide benefits, in cooperation with the states, to coal

16. Just a few examples are the Longshore Act, 33 U.S.C. § 932; the Price-Anderson Act, 42 U.S.C. § 2210 (nuclear plant accidents); 42 U.S.C. §§ 5154, 5172 (nuclear disaster relief); 7 U.S.C. § 1503 (crop insurance); 33 U.S.C. § 1321(d), (p) (maritime disasters); 30 U.S.C. § 1257 (surface coal mining operations); 41 U.S.C. § 351 (government contractors); 46 C.F.R. § 540.20 (1987) (cruise ships); 14 C.F.R. Part 205 (1987) (air carriers).

miners who are totally disabled due to pneumoconiosis, and to the surviving dependents of miners whose death was due to such disease. . . .")

In sum, there are many sound reasons why the Secretary of Labor constructed section 727.203 as he did, not the least of which is that the benefit-funding mechanisms available and the rights of claim defendants deserved protection.

II.

THE SSA RULE WOULD DEPRIVE CLAIM DEFENDANTS OF RIGHTS UNDER THE ADMINISTRATIVE PROCEDURE ACT AND OF DUE PROCESS OF LAW

The Black Lung Benefits Act provides that the regulations of the Secretary of Labor "shall be issued in conformity with" 5 U.S.C. § 553. 30 U.S.C. § 936(a). Only the Secretary of Labor is authorized to promulgate regulations governing the consideration or disposition of claims adjudicated by the Department of Labor. *Id.; see id.* §§ 902(f)(1), 932(h). Section 410.490 Labor was neither published by the Secretary of Labor nor was it ever placed in the public domain for participation and comment as a rule affecting the rights of private parties. No argument can be made that any interim presumption is merely a statement of agency policy or that it fits any of the exceptions to 5 U.S.C. § 553.

Neither court below had authority to promulgate section 410.490 for Labor Department claims. The procedures set forth in 5 U.S.C. § 553 are there to protect members of the public from arbitrary rulemaking practices and to ensure that rules adopted by an agency reflect a proper and careful deliberation of competing views. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978); *FCC* v. *Schreiber*, 381 U.S. 279, 290-92 (1965). The courts may not simply step in to accomplish what the agency is prohibited from doing. *See Heckler* v. *Lopez*, 463 U.S. 1328, 1333-34 (1983);

Northwest Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77, 97 (1981).

Yet, this is precisely what the Fourth Circuit and the Eighth Circuit have done. It is not valid rulemaking and should not be sustained by this Court.[17]

Economic regulatory legislation will rarely succumb to challenge under the Due Process Clause. This Court has afforded Congress considerable leeway in regulating our national economic life. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). But if, in fact, 30 U.S.C. § 902(f)(2) requires application of the SSA regulation to the private liability of mine owners and their insurers, the minimal rationality required by the Due Process Clause is hard to find. The right to a fair hearing compelled by the Due Process Clause is similarly difficult to discern.

Section 410.490 is, from everything that is apparent, designed to require the payment of black lung benefits to coal miners and their families whether or not the miner has black lung disease or any disability from that disease. *See* Comptroller Gen. of the United States, *Report to the Congress: Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability* 8 (1980) (reporting that "in 88.5% of the [SSA] cases, medical evidence was not adequate to establish disability or death from black lung"). Section 410.490 erects a mandatory inference that the miner is totally disabled or died due to black lung disease on the basis of proof that is barely connected to either ultimate fact, if it is connected at all. *See supra* pp. 5-6.

The mine owner or its insurer is afforded a right to a hearing, but at that hearing cannot prevail by proving the falsity of presumed facts. The plain language of section 410.490 so provides, and the courts have been assiduous in acknowledging the exceptionally limited rebuttal possibilities provided. 20 C.F.R.

17. Were this Court to agree that section 727.203 is unduly restrictive and remand the matter to the Labor Department for rulemaking, a curious phenomenon would ensue. In a rulemaking proceeding, the Department will not be able to make a credible record supporting its adoption of section 410.490. The simple truth is that proof of invocation of section 410.490 cannot support the inference of ultimate fact it mandates. A subsequent challenge to section 410.490 would prove the rule to be arbitrary and capricious.

§ 410.490(c); *Broyles*, 824 F.2d at 329; *Haywood* v. *Secretary of HHS*, 699 F.2d 277, 283 (6th Cir. 1983) (both noting that section 410.490 may be rebutted only by proof that the miner is working or able to work). Section 410.490 provides no method of rebuttal at all if the miner is deceased. Thus, the survivor of a deceased miner who had perfectly normal ventilatory test results (*see supra* p. 6) is accorded a mandatory inference that death was due to pneumoconiosis and automatic entitlement to benefits under section 410.490. Again, the plain language of section 410.490 so provides. 20 C.F.R. § 410.490(c).

There is no rationality here. Application of section 410.490 would be a taking of the property of mine owners and insurers without due process of law.[18] It would be an outright sham and should not be tolerated under the Constitution. "[T]he Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan* v. *Zimmerman Brick Co.*, 455 U.S. 422, 433 (1982); *see also Brock* v. *Roadway Express, Inc.*, 107 S. Ct. 1740, 1749 (1987). Section 410.490 clearly abridges these rights.

III.
THE REOPENING OF CLOSED CASES IS BARRED BY THE LONGSHORE ACT AND BY THE RULE OF RES JUDICATA

Longshore Act procedures govern the adjudication of Department of Labor black lung claims. 33 U.S.C. §§ 919, 921, *incorporated by reference into* 30 U.S.C. § 932(a); *Director, Office of Workers' Compensation Programs* v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977). Longshore Act procedures are exclusive, and the time limits fixed by the provisions of the Longshore Act for the pursuit of both administrative and judicial remedies

18. For insurers, section 410.490 would have the additional impact of retroactively rewriting the insurance contracts entered into with mine owners. These contracts provided no coverage for non-occupational conditions or disabilities. This feature of section 410.490 casts further doubt on the constitutional validity of the SSA rule if applied in Part C cases. *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. at 16-17.

are jurisdictional. 33 U.S.C. § 921(a), (c). *Crowell* v. *Benson*, 285 U.S. 22, 49-53 (1932); *Louisville & N. R.R. Co.* v. *Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); *Bennett* v. *Director, Office of Workers' Compensation Programs*, 717 F.2d 1167 (7th Cir. 1983); *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *aff'd on other grounds sub nom. Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 244 (1977).

The Longshore Act requires reversal of the Eighth Circuit's decision in *Sebben*. Where Congress establishes a comprehensive procedure for the adjudication of a particular class of cases, "those procedures are to be exclusive." *Whitney Nat'l Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965); *cf. United States* v. *Fausto*, 108 S. Ct. 668, 675 (1988) (Congress may withdraw the right to judicial review of administrative action). Longshore Act procedures are comprehensive and exclusive. Section 21(e) of the Longshore Act provides that proceedings for the consideration of a denied claim "shall not be instituted otherwise than as provided in" the Longshore Act. 33 U.S.C. 921(e).

The *Sebben* plaintiffs[19] seek to bypass this prohibition. There is no showing that pursuit of the statutory remedies provided would have been futile, and indeed the circuit court decisions now before this Court demonstrate that the pursuit of statutory remedies would not have been futile. No argument can be made that this dispute over interim presumptions in any way involves the constitutional rights of black lung claimants. No claim can be made that the identity of the correct eligibility standard is beyond the jurisdictional purview of the Benefits Review Board or certainly the circuit courts. The Longshore Act unambiguously provides that there is only one way to adjudicate black lung claims, and that avenue prohibits alternative access to the district

19. Many within the putative *Sebben* class, including the class representatives, failed to exhaust their administrative remedies. This failure generally precludes the exercise of mandamus jurisdiction under 28 U.S.C. § 1361 by the district courts in a collateral action. *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984).

courts.[20] Were that not the case, the rule of res judicata is still properly applied in this administrative setting.

This Court has observed that the application of res judicata in civil litigation is not a matter of discretion for the federal courts. "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*.'" *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401-02 (1981) (citation omitted). In an administrative setting the rule of res judicata should be applied where the agency acts in a judicial capacity and the parties have had a fair chance to litigate. *University of Tenn.* v. *Elliott*, 106 S. Ct. 3220, 3226 (1986); *see also* Restatement (Second) of Judgments § 83, at 269 (1982). Where the rights of private parties are litigated in a proceeding governed by the Administrative Procedure Act, 5 U.S.C. § 554, *incorporated by reference into* 33 U.S.C. § 919(d), application of res judicata is particularly appropriate.

Black lung claim adjudications have all of the essential attributes of a civil trial for damages. It is difficult to discern a reason why res judicata should not apply. From the insurance industry's perspective, res judicata and finality are key elements of a fair hearing. Without these features, predictability and thus insurability become elusive. The insurance industry, including state insurance funds, cannot be expected to participate in the funding or financial management of open-ended federal welfare or entitlement programs, and there is no indication that Congress intended it to do so in the Part C portion of the black lung program. When Congress reopened previously denied claims in the 1977 amendments to the Act, it also transferred all liability for claims predicated upon coal mine employment terminating before January 1, 1970, to the Black Lung Disability Trust Fund, thus mitigating the inherent unfairness of once waiving res judicata. *Compare* 30 U.S.C. § 932(c) *with* 83 Stat. 796. When the 1978 funding formulation proved unfair, Congress again corrected funding

20. This also precludes the Eighth Circuit's reliance on 28 U.S.C. § 1361 as a jurisdictional predicate for action.

inequities. 30 U.S.C. §§ 902(i), 932(j).[21] The Eighth Circuit has no capability of funding its decision, and it does not share Congress's power to waive finality whenever the court perceives that equities so require. Res judicata applies to protect the rights of all parties, and its application is essential here.

The Eighth Circuit's reliance on *Bowen* v. *City of New York*, 106 S. Ct. 2202 (1986), is not justified. The result in *Bowen* draws rationale from specific provisions of the Social Security Act permitting a waiver of time limitations and from the exceptionally unfair actions of SSA in deciding cases under a secret rule. Neither feature of *Bowen* is even arguably present in this case. The Longshore Act permits no waiver of time limitations and there was nothing hidden in Labor's application of its regulation.[22] *Bowen* speaks not at all to the application of res judicata in the instant setting.

21. These corrections, of course, only shift liability to the coal industry as a whole, which must fund the added obligations of the Trust Fund.

22. If anything was clandestine, it was SSA's development of section 410.490. If any precedent can be drawn from *Bowen* for application in this case, it is that the private arrangement between SSA and congressional staff that generated section 410.490 invalidates any application of that rule to the detriment of private parties.

CONCLUSION

For these reasons, the decision of the Fourth Circuit and the decision of the Eighth Circuit must be reversed.

Respectfully submitted,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND FOURTH CIRCUITS

BRIEF OF THE NATIONAL COAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL COAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE[1]

Unless reversed, the decisions before this Court in the instant proceeding may force the coal industry to accept *all* liability for thousands of black lung claims reopened by the 1977 amendments to the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, and may remove the defensive rights secured by the Black Lung Benefits Act and this Court in *Mullins Coal Co., Inc. of Virginia* v.

1. Pursuant to Rule 36.2, written consents from counsel of record for all parties to these consolidated proceedings are being filed with the Clerk of this Court with this Brief.

Director, OWCP, 108 S.Ct. 427 (1987) ("Mullins") (interpreting the U.S. Department of Labor ("DOL") rules in 20 C.F.R. Part 727, which implement the 1977 amendments) and *Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976) (upholding the constitutionality of the 1969 and 1972 versions of the Black Lung Benefits Act presumptions and evidence rules against challenges by the coal industry).

The National Coal Association ("NCA") is a trade association representing coal mine operators who produce over sixty-five percent of the nation's coal. NCA's membership includes operating coal mining companies of all sizes, as well as coal brokers, equipment suppliers, coal transporters, consultants, electric utilities and resource developers.

NCA producer members, and all other U.S. coal producers, are responsible for the payment of benefits to eligible claimants under Part C of the Black Lung Benefits Act, 30 U.S.C. §§ 931-945 (the "Act"), in two direct ways: (1) as individual coal mine operator defendants[2], 30 U.S.C. §§ 932-933; and (2) as mandatory payors of a producers' tax into the Black Lung Disability Trust fund ("BLDTF"), 26 U.S.C. § 4121. Revenues collected for the BLDTF are used to pay compensation awards to eligible claimants whose coal mine employment ended before January 1, 1970; or in cases in which an individual responsible coal mine operator cannot be identified. 30 U.S.C. § 934, 26 U.S.C. § 9501(d)(5). The BLDTF also pays all administrative expenses of the Departments of Labor, Treasury, and Health and Human Services, which operate the black lung program. 26 U.S.C. §§ 9501(a)(2), 9501(d)(5). If the BLDTF is unable to meet its obligations with the funds generated by the producers' tax on coal, it borrows money from the U.S. Treasury, which the

2. Coal operators must secure federal black lung compensation liability by purchasing workers' compensation insurance or by qualifying as a self-insurer. 30 U.S.C. § 933. Both the self-insurance and purchased insurance arrangements involve intricate financial planning by the coal operator. This planning is based on the number of claims as a percentage of payroll and the expected approval rate.

BLDTF must repay with interest. 26 U.S.C. §§ 9501(c), (d)(4).

The tax paid by coal producers into the BLDTF, augmented by two tax increases,[3] is currently set at $1.10 per ton on underground-mined coal and $.55 per ton on surface-extracted coal. 26 U.S.C. §§ 4121(a), (b). The BLDTF has collected over $3.975 billion in tonnage taxes from coal producers since 1978.[4] In fiscal year 1987, the nation's coal producers paid $572,295,000 into the BLDTF in tonnage taxes.[5] But the BLDTF has paid out over $5.54 billion in compensation since 1978,[6] and in fiscal year 1987, disbursed $605 million in compensation.[7] In order to meet the continuing shortfall between compensation levels and BLDTF revenues, the BLDTF has been augmented by appropriations from the general treasury each year since its inception in 1978. As a result, the BLDTF currently owes the U.S. Treasury nearly

3. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635 (1981); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L. No. 99-272, § 13203(a), (b), 100 Stat. 312 (1986) [hereinafter cited as 1986 Budget Reconciliation Act]. Congress provided that the 1981 tax increase was temporary, and that the producers' tax would revert to lower, 1978 rates by January 1, 1996, or when the BLDTF was no longer in debt to the U.S. Treasury for repayable advances or interest, whichever occurred first. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119 §102(a), 95 Stat. 1635 (1981); the 1986 Budget Reconciliation Act, Pub. L. No. 99-272, §13203(c), 100 Stat. 313. In 1987, the Administration proposed to increase the tax on producers yet a third time to raise $400 million in additional revenues. Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1988* at 2-41. Congress refused, instead extending the date for reversion of the current tax to the lower 1978 rate until January 1, 2014. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503 (1987), *amending* 26 U.S.C. § 4121(e)(2).

4. U.S. Dep't of the Treasury, *Black Lung Disability Fund, Status of Funds* (Sept. 30, 1987) [hereinafter cited as *1987 Trust Fund Status Report*].

5. *Id.*

6. Staff of Joint Comm. on Taxation, 99th Cong., 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* 3 (Comm. Print 1985); and information supplied by James DeMarce, Associate Director for the Division of Coal Mine Workers Compensation, U.S. Dep't of Labor, in a telephone interview with Bruce Watzman, NCA (Dec. 7, 1987).

7. *1987 Trust Fund Status Report*, *supra* note 4. These disbursement figures do not include the cost of administering the program.

$3 *billion*.[8] In May 1988, the Secretary of labor requested an additional appropriation of $54 million to the BLDTF.[9]

The two decisions before this Court, *Broyles* v. *Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987) (No. 87-1095) ("*Broyles*"), and *Sebben* v. *Brock*, 815 F.2d 475 (8th Cir. 1987) (Nos. 87-821 and 87-827) ("*Sebben*"), will have a dramatic impact on the coal industry. The coal industry's responsibility for black lung liability will be increased to intolerable levels if either or both cases are not reversed by this Court.[10] Under *Broyles*, employers will be forced to defend black lung claims under an exceedingly far-reaching entitlement presumption that precludes the defendant from challenging the medical bases for the presumption: the Social Security Administration "interim" adjudicatory rules at 20 C.F.R. § 410.490 ("SSA interim presumption"). These rules were never intended to apply to the workers' compensation portions of Part C of the Act and are virtually irrebuttable. Under *Sebben*, tens of thousands of finally denied and long-closed black lung claims will be reopened for relitigation under the SSA interim presumption.

The intolerable increase of unanticipated and unfunded liability which will result if *Broyles* and *Sebben* are not reversed will come at a time when the American coal industry can least afford it. NCA members are therefore critically interested in this Court's resolution of the important issues presented by these consolidated cases.

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8. *See supra* note 6.

9. *Hearings before the Subcomm. on Labor, Health and Human Service, Education and Related Agencies of the Senate Comm. on Appropriations*, 100th Cong. 2d Sess. 2 (Apr. 13, 1988) (statement of Ann McLaughlin, Secretary of Labor).

10. The Pittston Coal Group and its co-petitioners estimate that *Sebben* will burden the coal industry with as much as $13.6 billion in unanticipated and unfunded black lung liability. Petition for a Writ of Certiorari at 19, *Pittston Coal Group* v. *Sebben, petition for cert. granted*, 56 U.S.L.W. 3568 (U.S. Feb. 23, 1988) (No. 87-821).

SUMMARY OF ARGUMENT

The process culminating in the adoption of the Department of Labor's interim presumption reflects a compromise between affordability to industry and generosity to miners. The DOL regulations promulgated as a result of this compromise are so liberal that they approach unconstitutionality, but are saved by retaining some basic concept of defensive rights.

The Fourth Circuit's effective elimination of rebuttal by replacing Labor's interim presumption with that of the Social Security Administration ("SSA") transforms the black lung program into a general disability scheme rather than workers' compensation. This action misinterprets Congress's mandate, upsets the balance of the competing interests involved and results in liability to private parties without due process of law.

The Eighth Circuit's directive to reopen tens of thousands of finally closed and denied Department of Labor claims for readjudication under SSA's presumption is devoid of any legal authority. It defies the plain language of the Longshore Act barring relitigation of closed claims and removing jurisdiction from district courts. It violates the rule of res judicata. And it does this in the context of private claims litigation at extraordinary expense to the coal industry.

NCA joins the federal and private petitioners in the consolidated cases in seeking reversal of both *Broyles* and *Sebben*.

ARGUMENT

I.

APPLICATION OF SSA'S INTERIM PRESUMPTION TO DEPARTMENT OF LABOR CLAIMS IGNORES FUNDAMENTAL DIFFERENCES IN THE NATURE OF THE PROGRAMS AND THE ROLE OF THE COAL INDUSTRY IN THE REGULATORY AND LEGISLATIVE PROCESS

Title IV of the Federal Coal Mine Health & Safety Act of 1969[11] is divided into two parts, Part B and Part C. Part B deals with claims filed on or before December 31, 1972, and is funded by general federal revenues. SSA was given responsibility to administer Part B claims.[12] Part C deals with claims filed after that time. Awards under Part C are the responsibility of mine operators. DOL was chosen to administer Part C claims.[13]

The Secretary of Labor was not authorized to write regulations defining total disability under the Federal Black Lung Act until Congress amended the Act in 1977. Under the original Act, only the Secretary of Health, Education and Welfare ("HEW")was authorized to promulgate regulations for determining whether benefits should be paid under the program. Congress originally directed that SSA's regulations were to be applied in Part C claims.[14]

SSA's administration of the program from 1969-1971 was criticized by certain members of Congress who felt that too few claims were b g approved. S. Rep. No. 743, 92d Cong., 2d Sess. 18-19, *reprinted in* 1972 U.S. Code Cong. & Ad. News 2322-23. Out of the debates and discussions that culminated in

11. Federal Coal Mine Health and Safety Act of 1969, Pub.L. No. 91-173, § 411, 83 Stat. 792 (1969), *reprinted in* 1969 U.S. Code Cong. & Ad. News 823, 880-886 [hereinafter cited as the 1969 Act].

12. The 1969 Act, Pub. L. No. 91-173 §§ 411-414, 83 Stat. 792(1969). The 1972 amendments to the Act extended Part B to include claims filed on or before June 30, 1973. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 5, § 7, 86 Stat. 155-157 (1972) *reprinted in* 1972 U.S. Code Cong. & Ad. News 183, 189, 190, 192 (amending the 1969 Act, Pub. L. No. 91-173, § 414 and adding a new § 415).

13. The 1969 Act, Pub. L. No. 91-173 §§ 421-424, 83 Stat. 792 (1969).

14. The 1969 Act, Pub. L. No. 91-173 § 422(h), 83 Stat. 792 (1969).

1972 amendments to the Act, it became clear to SSA that it was to adopt a new, interim rule to "permit prompt and vigorous processing of the large backlog of claims. . . ." *Id.* SSA promulgated its interim presumption at 20 C.F.R. § 410.490(b) (1987) in response to the 1972 amendments. 20 C.F.R. § 410.490(a) (1987). This presumption applied only to Part B claims. 20 C.F.R. § 410.490(b) (1987).

Because Part C was intended to provide workers' compensation benefits for total disability due to coal workers' pneumoconiosis, and Part B was modeled after the SSA disability program, SSA resisted extension of its interim presumption to Part C claims.[15] SSA's interim presumption was also criticized for its lack of medical foundation.[16] The debate over the extension of SSA's interim presumption to Part C claims continued for four years and was resolved in the 1977 amendments to the Act.[17]

In those 1977 amendments, Congress directed the Secretary of Labor to write his own regulations (in two sets) to be applied to reopened and newly filed Part C claims. These amendments specified, however, that in the rules for previously denied and pending claims subject to re-review by the 1977 legislation, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973. 30 U.S.C. §§ 902(f)(2), 945. DOL responded with its interim presumption at 20 C.F.R. § 727.203 (1987). Labor's regulation incorporated the medical criteria of the SSA interim presumption but also mandated consideration of all relevant evidence, and preserved the employer's right to meaningful defenses against claims

15. *See* H.R. Rep. No. 151, 95th Cong., 1st Sess. 15-19 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 251-255.

16. *Id.*

17. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) [herein after cited as the 1977 amendments]

by requiring the consideration of scientific and medical evidence.[18] The 1977 amendments also provided for review of previously denied and pending claims under the newly established eligibility criteria.

These decisions did not take place without industry participation or comment. To the contrary, Congress repeatedly considered the effect of its actions on the coal industry and acted to make the program affordable. For example, in the 1977 amendments, Congress excused mine owners from all direct liability arising out of a miner's employment before January 1, 1970. 30 U.S.C. § 932(c). This liability was assigned to the BLDTF. Congress in 1981 transferred additional direct liability from the mining industry to the BLDTF, recognizing the unfairness of imposing additional liability on private defendants for already closed claims. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 205, 95 Stat. 1645 (1981). In 1985, when the Administration proposed to raise the tax paid by coal producers into the BLDTF by fifty percent, Congress refused. It acknowledged that the coal industry was in financial difficulty and should not be saddled with added black lung taxes.[19] Instead, Congress

18. *See* 124 Cong. Rec. S1446 (Feb. 4, 1978) (Debate on Conference Report on the 1977 amendments). Statement of Sen. Javits, conferee and sponsor:

> I wish to assure my colleagues that although the bill incorporates a number of liberalized standards governing the adjudication of black lung benefit claims, it clearly preserves its basic integrity as a workers' compensation program by requiring a finding *not only* of the *presence of black lung disease*, but, also that the claimant's *disability due to the disease* prevents him from performing coal mine work.
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> * * *
>
> I . . . requested that the statement of managers include language to the effect that "*all relevant medical evidence*" be considered in applying the "interim" standards to the reviewed claims . . . .

[Emphasis added.]

19. 131 Cong. Rec. S15,477-79 (daily ed. Nov. 14, 1985) (remarks of Sen. Heinz and Warner). "A significant increase in the black lung excise tax would contribute to the loss of both domestic and international markets for [the] coal industry." 131 Cong. Rec. S15,478 (daily ed. Nov. 14, 1985) (remarks of Sen. Warner). A national accounting and management firm reported in 1985 that the coal industry had slowed to a very modest annual rate of growth and was subject to increased competitive pressure from other fuels. Price Waterhouse, *The Economic Impact of the President's Tax Reform Proposals on the Coal Industry, Final Report* 3 (Sept. 1985).

enacted a ten percent tax increase and placed a five-year moratorium on interest accrual.[20] Similarly, in 1987, Congress again refused an Administration proposal to increase the tax on producers yet again, and instead, extended the date by which the producers' tax would revert to its lower, 1978 rate.[21]

Congress's actions since the inception of the black lung program in 1969 have consistently recognized the competing policies of compensation to eligible miners, affordability to the industry, and procedural fairness to defendants as well as claimants. Coal industry representatives participated in this legislative debate and subsequent rulemaking.[22] As in all complex issues, a compromise had to be forged. In this case, the liberality of the DOL presumption was balanced by its procedural safeguards and Congress's promise that costs would be affordable. The decisions in *Broyles* and *Sebben* destroy this compromise and are far out of step with Congress's consistent and repeated efforts to protect the coal industry from unanticipated and uncontrolled liability.

II.
APPLICATION OF SSA'S INTERIM PRESUMPTION IN PRIVATELY FUNDED CLAIMS DEPRIVES THE MINE OPERATORS OF DUE PROCESS OF LAW

A. Labor's Interim Presumption Already is Exceedingly Generous to Claimants

Labor's interim presumption achieved the liberality to miners that Congress sought. Armed with its new presumption, Labor

20. Consolidated Omnibus Budget Reconcilation Act of 1985, Pub. L. No. 99-272, § 13203(a), (b), 100 Stat. 312 (1986).

21. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503 (1987), amending 26 U.S.C. § 4121(e)(2). None of the requests for additional funding take into consideration the potential impact of these cases.

22. *Problems relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 139 (1981) (statement of Carl E. Bagge, President, NCA).

approved 96,000 claims,[23] well in excess of congressional projections.[24] This presumption is extremely liberal. The BLDTF has paid benefits in claims eighty-four percent of which contained no evidence of disease or related disability. Comptroller General, *Report to the Congress: Legislation Authorized Benefits Without Adequate Evidence of Black Lung or Disability* 9 (1982). Coal operator defendants been able to successfully avoid such a high percentage of unjustified awards by exercising their right to defend claims.[25] This defense is permitted primarily by DOL's rebuttal provisions which legitimately focus the entitlement inquiry on the basic elements of a compensable claim. Indeed, without the opportunity for rebuttal, Labor's presumption would be unconstitutional. *See Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976). Recent opinions by several circuit courts, however, already have substantially eroded rebuttal under Labor's rule.

The Third, Fourth, and Sixth Circuits have held that rebuttal under section 727.203(b)(2) can no longer be established by

23. Office of Workers' Compensation Programs, U.S. Dep't of Labor, *Black Lung Claims Status Report* (Feb. 20, 1987). From 1978 to the present, approximately 96,000 BLDTF claims have been approved by the Department of Labor pursuant to the 20 C.F.R. § 727.203. The BLDTF is also responsible for compensation in approximately 24,000 previously denied claims approved by the Social Security Administration under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 and referred to the Secretary of Labor for payment from the BLDTF, 30 U.S.C. § 945(a)(2)(A); thus, the total number of claims that are the liability of the BLDTF alone because of the 1977 amendments totals approximately 120,000. *1987 Black Lung Claims Status Report, supra.*

24. H.R. Rep. No. 151, 95th Cong., 1st Sess. 26, *reprinted in* 1978 U.S. Code Cong. & Ad. News 262. Prior to the 1977 amendments and the promulgation of 20 C.F.R. § 727.203(a), fewer than 5,000 claims had been approved under Part C. See Lopatto, *the Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 691 (1983), citing Staff of Subcomm. on Oversight, House Comm. on Ways and Means, *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund*, 97th Cong. 1st Sess. 23 (Comm. Print 1981).

25. Claims involving BLDTF liability are defended by the Office of Solicitor, Department of Labor only occasionally. As a political and financial matter, they cannot and have not developed these claims to even permit rebuttal where it is possible.

proving the absence of a pulmonary disability.[26] Rebuttal under (b)(2) is no longer available if a miner is disabled for any reason—by a stroke, heart disease, osteoarthritis, or even age. By shifting the focus of (b)(2) rebuttal from pulmonary disability to disability of any origin, these three circuit courts have effectively eliminated subsection (b)(2) as a viable rebuttal method in many cases since most older claimants are disabled to some degree by non-occupational, ordinary diseases of life.

Rebuttal under section 727.203(b)(1)[27] is rarely used because most claimants are no longer working. Rebuttal under subsection (b)(4) is provided if the claimant does not have pneumoconiosis. However, (b)(4) rebuttal is difficult because most claimants can make a case that they have some form of pulmonary or respiratory impairment irrespective of whether that impairment is clinical pneumoconiosis. The definition of pneumoconiosis, 20 C.F.R. § 727.202 (1987), is broader than the "clinical" definition of pneumoconiosis.[28]

Thus rebuttal under section 727.203(b)(3)[29] is the only rebuttal avenue available in most cases. But even the scope of (b)(3) rebuttal is unclear because the circuit courts and the Benefits Review Board have adopted different proof standards.[30]

26. *Kertesz* v. *Crescent Hills Coal Co.*, 788 F.2d 158 (3d Cir. 1986); *Sykes* v. *Benefits Review Board*, 812 F.2d 890 (4th Cir. 1987); and *York* v. *Director*, 819 F.2d 134 (6th Cir. 1987).

27. Section 727.203(b)(1) provides for rebuttal if the claimant is doing his usual coal mine work or comparable and gainful work.

28. "Clinical" pneumoconiosis is actual coal dust deposition throughout the lungs which results in coal macules around the respiratory bronchioles. "Statutory" pneumoconiosis includes clinical pneumoconiosis but it also ecompasses *any* pulmonary or respiratory impairment significantly related to or substantially aggravated by coal mine employment (*e.g.*, industrial bronchitis). 20 C.F.R. § 727.202 (1987).

29. Rebuttal under section 727.203(b)(3) may be accomplished by proof that a miner's disabiity did not arise in whole or in part out of his coal mine employment.

30. The Third, Fourth and Sixth Circuits all have held that an employer must "rule out" any relationship between a miner's total disability and his occupational exposure to coal dust in order to establish (b)(3) rebuttal. *Bethlehem Mines Corp.* v. *Massey*, 736 F.2d 120 (4th Cir. 1984); *Carozza* v. *U.S. Steel Corp.*, 727 F.2d 74 (3d Cir. 1984); *Gibas* v. *Saginaw Mining Co.*, 748

B. Application of SSA's Interim Presumption Means Entitlement Without Giving Industry Its Day in Court

The Fourth Circuit's holding in *Broyles* deals the fatal blow to rebuttal in Part C claims reopened by the 1978 Amendments and obliterates any semblance of due process protection to coal operators. A plainer case of the denial of employer's due process rights through the use of section 410.490 is difficult to imagine. This Court has established a constitutional threshold for statutory presumptions. *Usery* v. *Turner-Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976); *Mobile, Jackson & Kansas City R.R. Co.* v. *Turnipseed*, 219 U.S. 35, (1910). The Court has required a "rational connection" between the fact proved and the ultimate fact presumed, *Turnipseed*, 219 U.S. at 43, and has honored a long-standing prohibition against placing defendants in a situation where they cannot rebut a presumption of entitlement to benefits. *Turner-Elkhorn*, 428 U.S. at 35-36. Labor's interim presumption, as interpreted by this Court, protects this basic principle. *Mullins Coal Co.*, 108 S. Ct. 427. SSA's interim presumption does not.

The lack of a "rational connection" between section 410.490 and the medical bases of pneumoconiosis and resulting disability was conceded by SSA when it promulgated those regulations in 1972. The preamble admits that the rule was issued on an interim basis to remove a backlog of claims without waiting for establishment of more facilities to conduct extensive pulmonary testing. 20 C.F.R. § 410.490(a).

When the suggestion of applying section 410.490 to reopened Part C claims appeared during the legislative process culminating

F.2d 1112 (6th Cir. 1984), *cert. denied.*, 471 U.S. 1116 (1985). If a miner is totally disabled from a respiratory standpoint, it is difficult to prove that his occupational exposure has not made *any* contribution, however slight, to his respiratory condition. The Benefits Review Board has modified this standard and held that (b)(3) rebuttal may be established by demonstrating that there is no "significant relationship" between a miner's total disability and his occupational exposure to coal dust. *Borgeson* v. *Kaiser Steel Corp.*, 8 Black Lung Reporter (MB) 1-312 (1985). The "significant relationship" test is a traditional workers' compensation principle, which is consistent with the legislative history of the Act.

in the 1977 amendments, witnesses testified before Congress that the section 410.490 presumption was medically invalid and should not be used to establish liability of operator defendants in reopened or future Part C claims.[31] Two supervisory SSA physicians also testified before Congress in 1977 that the section 410.490 standards were "not based on substantial medical evidence" and, speaking of the ventilatory test values, found invocation values were "entirely normal and would be read by at least 95% of all physicians who were knowledgeable of the values presented as normal values."[32] Numerous studies and reports since 1977 have confirmed the fact that section 410.490 lacks the required rational connection between its presumed facts and the facts proved.[33]

The SSA interim presumption also abrogates the procedural and evidentiary safeguards accorded the employer by the "all relevant evidence" provision in 30 U.S.C. § 923(b) and acknowledged by this Court in *Turner-Elkhorn* and *Mullins*. SSA wrote section 410.490 for use in a non-adversarial setting without the coal industry's participation. If an SSA claim were denied and the claimant requested further proceedings, he appeared before

31. *Black Lung Benefits Provisions of the Federal Coal Mine Health & Safety Act: Hearings Before the House Committee on Education and Labor*, 95th Cong., 1st Sess. 241-242 (1977) [hereinafter cited as 1977 House Hearings] (testimony of Asst. Secretary of Labor Donald Elisberg).

32. 1977 House Hearings at 274-275 (testimony of Dr. Harold I. Passes). *See also Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 193-195 (1977) (testimony of Dr. Herbert Blumenfeld)*.

33. The SSA interim presumption uniformly has been criticized as medically invalid. See Comptroller General of the United States, *Report to the Congress of the United States, Legislation Allows Black Lung Benefits to be Awarded Without Adequate Evidence of Disability*, HRD 80-81 (July 28, 1980) (reporting that "in 88.5% of the cases [decided by SSA] medical evidence was not adequate to establish disability or death from black lung." *Id.* at *ii*).A.D. Renzetti, Jr., M.D., *et al., Current Medical Methods in Diagnosing Coal Workers' Pneumoconiosis, and a Review of the Medical and Legal Definitions of Related Impairment and Disability*, prepared for U.S. Dep't of Labor under the auspices of the Franklin Research Center, a Division of the Franklin Institute (1983) (confirming the scientific invalidity of eligibility criteria employed in the black lung program)

an Administrative Law Judge ("ALJ"). SSA was not typically represented by counsel. The ALJ was supposed to make the claimant prove his case, but the proceeding and resulting record often lacked evidence developed by expert defense witnesses or adversary cross-examination of the claimant because there was no true defendant in the SSA cases. This procedural scheme resulted in awards in over 80% of the claims brought under SSA's interim presumption.[34] To now make employers litigate thousands of black lung claims under section 410.490 is neither justified nor equitable nor consistent with Congress's intent.

Rebuttal under SSA's interim presumption does not save the provision from its constitutional infirmities. Once a claimant invokes the presumption (20 C.F.R. § 410.490(b)(1)(i) (1987)), the inquiry switches to rebuttal. Medical evidence has no discernible role in section 410.490 rebuttal. Rebuttal is limited to evidence that the claimant is doing or able to do his usual coal mine or comparable work. 20 C.F.R. § 410.490(c) (1987). In practical terms, these rebuttal provisions are illusory because black lung claimants have typically left the workforce due to age or non-occupational infirmities. Defenses predicated upon obtaining medical proof revealing that the source of the claimant's alleged total disability is not dust exposure or pneumoconiosis—cigarette smoking being the most prevalent alternative[35]

34. SSA approved over 500,000 claims by 1978, representing over 81% of the claims filed. Letter from Secretary of HEW Joseph A. Califano, Jr., to Rep. Carl Perkins (Nov. 3, 1978); Staff of Subcomm. on Oversight, House Comm. on Ways and Means, 97th Cong. 1st Sess., *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund* 16 (Comm. Print) (1981) (citing U.S. Dep't of Labor and U.S. Dep't of Health and Human Services statistics).

35. A prominent pulmonary physician and scientist, Dr. Keith Morgan (former Director, Appalachian Laboratory for Occupational Respiratory Disease, HEW) reported to Congress in 1977 that: "The U.S. Public Health Service studies indicate that cigarette smoking is between 5 and 10 times as important as dust exposure in producing impairment of ventilatory capacity," *quoted in*, H. Rep. No. 151, 95th Cong., 1st Sess. 80, *reprinted in* 1978 U.S. Code Cong. & Ad. News 293. In May 1982, the Ad Hoc Working Group of the American Thoracic Society issued a very strong statement in favor of increased reliance on x-rays in diagnosing pneumoconiosis and calling for recognition by the DOL that cigarette smoking is usually the dominant factor for respiratory

—or proving low levels of dust exposure, do not fit into the SSA rebuttal scheme and therefore are futile. *Yet, these are the very defenses contemplated as protections against benefit awards to miners without evidence of disabling coal workers' pneumoconiosis.* *Turner-Elkhorn*, 428 U.S. at 34; *Mullins*, 108 S. Ct. at 427. Under the SSA interim presumption, invocation is tantamount to entitlement.

For these reasons, application of 20 C.F.R. § 410.490 to mine operators cannot be constitutionally sanctioned.

III.
PRINCIPLES OF FINALITY IN ADVERSARY LITIGATION CANNOT BE DISREGARDED

Firmly established jurisdictional principles are violated by *Sebben*. Reawakening tens of thousands of long closed and finally denied claims offends the strict time limitations specified in the Longshore Act. 33 U.S.C. § 921(a)-(c), incorporated into 30 U.S.C. § 932(a). Res judicata also precludes relitigation of these black lung claims. In addition, issuance of a writ of mandamus by the district court breaches the Longshore Act's limitation on district court jurisdiction. 33 U.S.C. § 921(a)-(d). These principles of finality and exhaustion are basic to our system of jurisprudence. In the context of this litigation, they must be respected to ensure some measure of predictability for an industry already plagued by unpredictable costs and expenses. *Sebben* assures that the cost to the coal industry will be uncontrollable and the result unfair.

The BLDTF is already insolvent with the industry paying 110% more in taxes than expected. Even before the Eighth and Fourth Circuits' decisions, the ability of the BLDTF to achieve solvency by 1996 was dubious.[36] With *Sebben*, the BLDTF's

abnormalities in coal miners, *reprinted in* 128 Cong. Rec. E1979 (daily ed. May 4, 1982) (extension of remarks by Rep. Erlenborn)

36. Prior to the moratorium on interest accrual enacted in 1986, DOL had predicted that advances and interest necessary to meet BLDTF obligations after the 1978 amendments could reach *$30 billion* by the year 2010. H.R. Rep. No.

financial difficulties will be stretched well beyond the coal industry's ability to respond. Reserves for claim awards, expert witness and litigation costs based on Labor's interim presumption are rendered useless by emergence of a new set of adjudicatory rules imposed by judicial fiat ten years after the enactment of the 1977 amendments. The domestic coal industry currently is under tremendous threat from pressing financial pressures resulting from rising costs and depressed prices, regulatory costs, and imported energy.[37] The huge sums that the BLDTF would be forced to pay to meet the increased liabilities stemming from *Broyles* and *Sebben* inevitably will prompt calls for another increase in the producers' tonnage tax to curb the runaway BLDTF deficit. Another black lung tax increase either must be absorbed by coal producers or passed along to consumers. This presents a Hobson's choice to the industry. Absorbing the cost of a tax increase may eliminate some operators' ability to survive; raising prices even in long-term utility-supply contracts, the life blood of the coal industry,[38] would prompt the move toward electric utilities' purchase of foreign electricity or diversion of resources from coal-fired plants to facilities that use fuel other than domestic coal.[39] Congress and the Executive branch have reaffirmed the imperative role of a healthy domestic coal industry both in United States energy policy and for national security.[40] This policy would be

241, 99th Cong., 2d Sess., pt. 1, at 75-76, *reprinted in* 1986 U.S. Code Cong. & Ad. News 653-654.

37. *Hearing on the United States-Canada Free Trade Agreement before the Subcommittee on Mining and Natural Resources, House Comm. on Interior and Insular Affairs*, 100th Cong., 2d Sess. (March 10, 1988) (Statement of James M. Friedman).

38. Park et al., "Coal Supply Contracts," 4 *Coal Law and Regulation* §84 (1987).

39. *See generally*, John S. Herrington, Secretary, United States Dep't of Energy, *Energy Security, A Report to the President of the United States* 162-180 (Mar. 1987) [hereinafter cited as Energy Security Report].

40. *See* Mining and Minerals Policy Act of 1970, Pub. L. No. 91-631 § 2 (1970), 84 Stat. 1876, 30 U.S.C. § 21(a): "The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound

seriously undercut if the *Sebben* holding is permitted to make massive, costly *changes in the black* lung program.

The Longshore Act's procedures are comprehensive, complete and exclusive. 33 U.S.C. § 921. There is simply no authority for the Eighth Circuit's ruling under the Longshore Act. Similarly, res judicata is mandatory. "There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata*." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) (citation omitted). And the mandamus statute, 28 U.S.C. § 1361, is inapplicable here, because the district court lacks jurisdiction to invoke it. The *Sebben* decision ignores all this.

Instead, *Sebben* orders the revival of old, closed claims.[41] And the decision virtually guarantees awards, given the problems of proof in these stale claims, the limited resources and limited mission of the Department of Labor to defend such claims and the lack of any avenues of rebuttal by medical evidence even if the claims were defended. At the same time, such a precedent invites every denied workers' compensation claimant to proceed outside

and stable domestic mining . . . industries." Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201(a): "coal mining operations presently contribute to the nation's energy requirements . . . ." *See also* Energy Security Report *supra* note 39.

41. Employers have never received notice of the existence of many of these claims. As explained in *U.S. Pipe and Foundry Co.* v. *Webb*, 595 F.2d 264, 271-274 (5th Cir. 1979), the DOL's applicable regulations (20 C.F.R. § 725.151 (1978); 20 C.F.R. § 725.412 (1987)), the DOL does not normally give notice to a potential responsible coal operator defendant of a claim unless: (a) the claim is administratively approved; or (b) after a claimant in a denied claim requests a hearing. Thus, in thousands of cases in the *Sebben* class in which claimant did not appeal denials under the 20 C.F.R. Part 727 (1987) eligibility standards, re-opening will prompt notice to employer *for the first time* that he must defend a particular black lung claim. By the terms of the 1977 amendments, all of the *Sebben* class members filed between December 20, 1969, and April 1, 1980. *Sebben*, if undisturbed by this Court, will require the defense of claims that are a minimum of *nine* years old and could be almost twenty years old. The opportunity to obtain an expert medical examination will concurrently be nine or more years stale, and the aging process or intervening death of the claimant will thwart any bona fide defense effort.

the prescribed statutory scheme for adjudication of claims. *Sebben* requires the courts to keep its doors open indefinitely to any black lung claimant dissatisfied with an administrative agency's action at the expense of the coal industry. The resulting unfairness to the industry is manifest.

CONCLUSION

The decisions below in *Sebben* and *Broyles* are wrong for the reasons set forth in Petitioners' Brief and would impose substantial unwarranted burdens on the coal industry. Therefore, the judgments of the Fourth and Eighth Circuits should be reversed.

Respectfully submitted,

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